

H. Wheat. (6)
George Derring

267

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 444

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

or

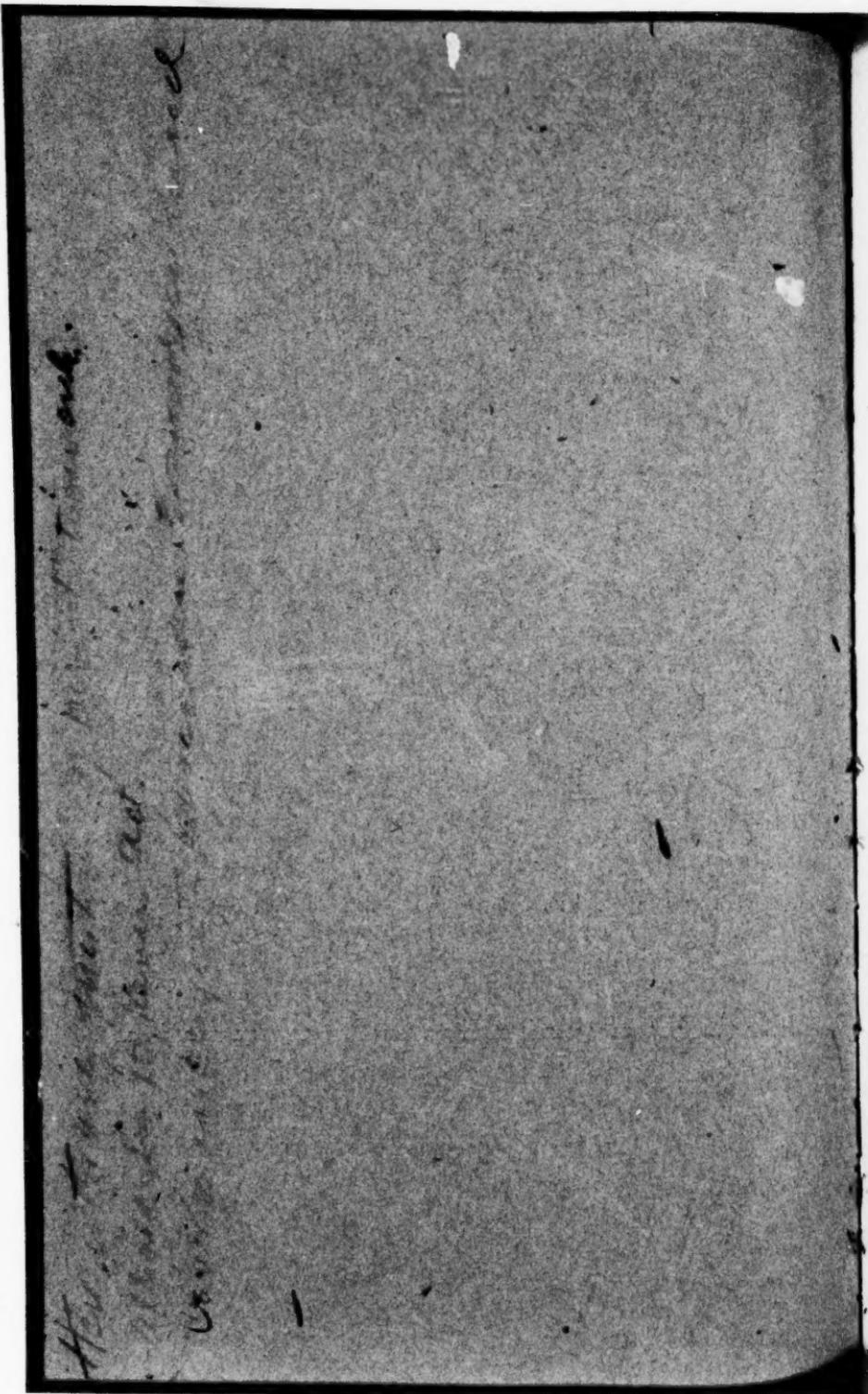
THE ARCHIBALD McNEIL & SONS CO., INC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

FILED JUNE 11, 1924

(80,400)

Handwritten only



(30,409)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 444

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

vs.

THE ARCHIBALD McNEIL & SONS CO., INC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

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[fol. 1] IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA, SEPTEMBER
TERM, 1922

No. 9792

THE ARCHIBALD MCNEIL & SONS COMPANY, INC.,

vs.

UNITED STATES OF AMERICA

Charles H. Burr.

DOCKET ENTRIES

- Nov. 1, 1922. Praecept for Summons, filed.
 1, Summons exit—returnable first Monday in December, 1922, filed.
 11, Statement of Claim, filed.
 11, Exhibit A, filed.
 11, Notice to file Affidavit of Defense, filed.
 13, Summons returned on November 11, 1922, served and filed.
 17, Stipulation of counsel extending time in which to file Affidavit of Defense, filed.
- Dec. 16, 1922. Special appearance of George W. Coles, filed.
 16, Motion to dismiss Statement of Claim, filed.
 16, Praecept to place cost on Argument List, filed.
 27, Affidavit as to service of Summons and Statement of Claim, filed.
- Feby. 15, 1923. Opinion, Dickinson, J., dismissing Motion to dismiss Statement of Claim, filed.
 20, Praecept to place case on Trial List, filed.
 28, Defendant's exception to Opinion of the Court dismissing Motion to dismiss for want of jurisdiction, filed.
 28, Affidavit of defense raising questions of law, filed.
- Mar. 23, Supplemental affidavit of Defense raising Questions of Law, filed.
- [fol. 2]
- Apr. 16, 1923. Argued sur Statutory Demurrer.
 May 4, Opinion Dickinson, J., granting leave to file affidavit of defense in 15 days, filed.
 18, Argued sur Motion for extension of time for filing affidavit of defense—Eo die ordered that defendant have an extension of 30 days for filing affidavit of defense.
- July 7, Affidavit of Defense, filed.
 18, Praecept to place case on Trial List, filed.

Oct. 29, Stipulation of counsel waiving Jury Trial, filed.
 Nov. 28, Trial before Court without a Jury—Witnesses
 sworn.

Jan. 4, 1924. Argued sur pleadings and proofs.
 14, Opinion, Dickinson, J., filed.

Feby. 25, Judgment in favor of plaintiff in \$21,372.11, filed.
 May 7, Certificate that jurisdictional question is involved,
 filed.

7, Assignments of error, filed.
 7, Petition for Writ of Error to Supreme Court, filed.
 7, Order of Court granting prayer of petition, filed.
 8, Writ of Error allowed and copy thereof lodged in
 Clerk's Office for adverse party.
 8, Citation allowed and issued.
 12, Citation returned—service accepted and filed.
 26, Præcipe as to transcript of record sur Writ of Error,
 filed.
 26, Testimony, filed.

[fol. 3]

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of
 the District Court of the United States for the Eastern District of
 Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of
 the Judgment of a plea which is in the said District Court before
 you, or some of you, between The Archibald McNeil & Sons Co.,
 Inc., plaintiff, and United States of America, defendant, a manifest
 error hath happened to the great damage of United States of Amer-
 ica, as by its complaint appears. We being willing that error, if
 any hath been, should be duly corrected, and full and speedy jus-
 tice done to the parties aforesaid in this behalf, do command you,
 if judgment be therein given, that then, under your seal, distinctly
 and openly, you send the record and proceedings aforesaid, with
 all things concerning the same, to the Supreme Court of the United
 States, together with this Writ, so that you have the same at the
 City of Washington within thirty days, in the said Supreme Court
 of the United States, to be then and there held, that the record and
 proceedings aforesaid being inspected, the said Supreme Court of the
 United States may cause further to be done therein to correct that
 error, what of right and according to the laws and customs of the
 United States should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the
 Supreme Court of the United States at Philadelphia, the eighth day

of May, in the year of our Lord one thousand nine hundred and twenty-four.

George Brodbeck, Clerk United States District Court, Eastern District of Pennsylvania. (Seal of the District Court of the United States, E. D. Penna.)

Allowed by the Court. O. B. Dickinson, J.

{ [fol. 4]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF CLAIM—Filed Nov. 11, 1922

The Plaintiff, The Archibald McNeil & Sons Company, Inc., a corporation organized and existing under the laws of the State of Connecticut, claims to recover of the defendant the sum of seventeen thousand four hundred twenty two dollars and thirty two cents (\$17,422.32), together with further compensation amounting to legal interest thereon, as hereinafter set forth, all of which is justly due and owing by the defendant to plaintiff upon a cause of action whereof the following is a statement:

I. Jurisdiction of this action arises under the Fifth Amendment to the Constitution of the United States and under the tenth section of the Act of Congress approved August 10th, 1917, 40 Stat. 276, commonly known as the Lever Act.

II. Plaintiff was at the times of the transaction hereinafter recited engaged in buying, selling and shipping bituminous coal chiefly for export to foreign countries. All of the coal hereinafter referred to and which is the subject matter of this suit was purchased by plaintiff under good and valid contracts made long prior to October 30, 1919, and had been sold by plaintiff for export prior to October 30, 1919. Plaintiff had procured its shipment by his vendor, the Jamison Coal & Coke Company to tidewater for export early in October 1919, and prior to October 30, 1919, it was lying either at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, whither it had been sent by the Railroad Administration through [fol. 5] its agents.

III. By virtue of the authority conferred by the aforesaid Act of Congress, the President of the United States, acting by and through the Fuel Administrator at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, commandeered and requisitioned a certain necessary fuel, namely, bituminous coal, owned by the plaintiff at the times and in the quantity set forth in a true and correct statement thereof hereto attached and made a part hereof, marked "Exhibit A".

The said coal was commandeered and requisitioned from or through the Commissioner of the Tidewater Coal Exchange, the Su-

perintendent of Transportation of the Philadelphia & Reading Railroad Company, the Shipping and Freight Agent of the United States Railroad Administration at Port Reading Terminal Piers, New Jersey, the Bituminous Coal Distribution Committee, the Regional Coal Committee, the Philadelphia & Reading Railroad Company, the Port Reading Railroad Company, the Federal Treasurer at Port Reading Terminal Piers of the United States Railroad Administration, and the Jamison Coal & Coke Company, the vendors of the said coal to the plaintiff.

All of the aforesaid coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense.

IV. The said coal was purchased and held at the said piers by plaintiff for export, and the fair and reasonable values and true market prices of said coal so commandeered and requisitioned as aforesaid, at the times and places and in the quantities as aforesaid, were as stated in "Exhibit A" hereto attached; and were not less than the price assumed to be fixed by the Fuel Administrator for New River Coal for export, to wit: \$4.536 per gross ton f. o. b. mines.

[fol. 6] V. During the whole of the period during which said coal was commandeered and requisitioned from plaintiff, there was a ready and constant market for said coal at said Port Richmond Piers and Port Reading Piers, where said requisitions were made from plaintiff, and said coal was then and there being continuously sold in large quantities.

VI. Plaintiff avers that the best measure of just compensation for private property commandeered and requisitioned by the United States of America as in the present case, is the fair market value thereof at the time and place of delivery as shown by the current market price in transactions of purchase and sale. Plaintiff avers that fair market values and current market prices of the coal commandeered and requisitioned by the United States as aforesaid, are as stated in "Exhibit A" hereto attached. But plaintiff further avers that the said coal had been sold by plaintiff for export prior to October 30, 1919, and that the net prices at which plaintiff so sold were in excess of said price of \$4.536 per gross ton f. o. b. mines; and that if a market as averred did not exist as alleged and believed, plaintiff is entitled to recover the said net prices at which plaintiff had sold.

VII. Plaintiff avers that it is entitled to just compensation which is the monetary equivalent of its property at the time of the delivery thereof, pursuant to the commandeering or requisitioning thereof. Payment in full not having been made at said time plaintiff avers that its right to just and full compensation as of said dates of delivery requires the allowance of compensation or

damages suffered by reason of delay in payment. Plaintiff avers that by reason of such delay in payment, it is entitled to compensation at the rate of six per cent per annum on the amount due for each requisition, from the respective dates of delivery, and that said rate of six per cent per annum is the fair and reasonable value for the retention of the money during the period covered by this claim.

[fol. 7] VIII. Plaintiff avers that it has made for the space of three years every effort to collect the value of the said coal so commandeered and requisitioned, and that no part of said sum has been paid by or on behalf of defendant to plaintiff, and that the whole of said sum, together with compensation for the detention thereof, is still justly due and owing by defendant to plaintiff.

Wherefore plaintiff brings this suit.

The Archibald McNeil & Sons Company, Inc., by (Sgd.)
Adam Hugo, Treasurer.

[fol. 8] "EXHIBIT A" TO STATEMENT OF CLAIM

Coal Requisitioned by Fuel Administrator

Dates, 1919	Gross tons	Market prices f. o. b. mines	Amount
Nov. 12.....	828.16	\$4.536	\$3,756.53
Nov. 17.....	753.66	4.536	3,418.60
Nov. 18.....	1,397.37	4.536	6,338.47
Nov. 26.....	337.40	4.536	1,530.45
Nov. 29.....	288.31	4.536	1,307.77
Dec. 16.....	236.	4.536	1,070.50
	3,840.90		\$17,422.32

Notices of said requisitions were given under dates of December 12, 1919, and December 18, 1919.

[fol. 9] Jurat showing the foregoing was duly sworn to by Adam Hugo omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

SPECIAL APPEARANCE FOR DEFENDANT—Filed Dec. 16, 1922

SIR: Enter my appearance conditionally and specially for the purpose of moving to dismiss the action brought in the above entitled case for want of jurisdiction.

George W. Coles, United States Attorney, appearing for the defendant conditionally and especially for the purposes of the above motion only.

To the Clerk U. S. D. C., E. D. of Pa.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed Dec. 16, 1922

And now, to wit: December 16, 1922, comes the defendant, the United States of America, by its attorney in and for the Eastern District of Pennsylvania, and moves the court to dismiss the Statement of Claim filed in the above entitled matter for the following reason:

The Statement of Claim filed by the plaintiff discloses the fact that the plaintiff is a Connecticut Corporation, and a citizen and resident of that State, and by reason thereof the action herein has been brought in the wrong District.

George W. Coles, United States Attorney.

Philadelphia, Pa.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

Sur Motion to Dismiss

OPINION—Filed Feb. 15, 1923

DICKINSON, J.:

The broad subject of jurisdiction has many phases. One is that of venue. This means essentially the question of whether a particular Court is the one vested with authority to adjudicate the cause. This is the question here raised. We begin with the proposition that the United States is not suable in any Court unless Congress has so en-

acted and then only in the Court which Congress has designated and in accordance with the conditions it has imposed.

The general proposition is of course true as applied to the exercise of jurisdiction in any case. A court may have jurisdiction in the broad sense of jurisdiction of the subject matter, or of the litigants, or it may not. The appropriate phrase in which to express this phase of the thought of jurisdiction is the possession of the judicial power. The judicial power of Courts of the United States extends "to controversies to which the United States shall be a party." The particular proposition, however, is much narrower than this. It is built upon the ground of the immunity of the sovereign, and this is wholly independent of the other question of judicial power except that as this Court has general jurisdiction in controversies to which the United States is a party if in consenting to the bringing of a particular action Congress did not designate the Court which should entertain it, the inference would be a fair one that it was intended that any Court which has this general jurisdiction might try the [fol. 13] cause. The question thus becomes one, the answer to which must be sought in the Acts of Congress.

The Legislation

Congress has permitted actions to be brought against the United States and judgment may be rendered therein. One such enactment is the Tucker Act. All are agreed that actions under the Tucker Act can only be brought in the District of the plaintiff. If this action has been brought by virtue of the consent of Congress as expressed in the Tucker Act, it follows that it must be dismissed because this Court is without authority to try it.

There is, however, another Act, known as the Lever Act, approved August 10th, 1917, Section 10, of which confers the right to bring an action against the United States without condition limiting the right to any district.

The Facts of the Case

The facts of this case, as disclosed by the proceedings, are that the plaintiff is a citizen of another State and not an inhabitant of this District. It also shows that the cause of action arises out of Section 10 of the Lever Act.

Discussion

The whole discussion is thus centered upon the answer to the question of whether the consent of the United States to be sued for a cause of action arising under the Lever Act is given by that Act or the Tucker Act. The case of *United States vs. Pfitch*, 256 U. S. 547 decides the question. The exact question which arises here was there presented. If the District Court there had jurisdiction of the action before it merely because it was a District Court having jurisdiction of the parties, no right to a writ of error direct to the Supreme

Court existed. If its authority to try the case was conferred by the [fol. 14] provisions of the judicial code which gave the District Courts concurrent jurisdiction with the Court of Claims up to a limited sum, a writ of error might properly issue from the Supreme Court directly to the District Court. The right of action there, as here, was given by the Lever Act. The writ of error had issued direct to the District Court. It was dismissed for want of jurisdiction. Translated into terms of the instant case the ruling means that this Court has jurisdiction as a District Court and is not restricted to the limited and special jurisdiction conferred by the Tucker Act.

We see nothing to be gained by pursuing the argument addressed to us upon the subject of the possession by this Court of this general jurisdiction.

We are unable to see any bearing which the distinction drawn between the jurisdiction of the Court and methods of procedure has upon the question before us. The question is wholly one of jurisdiction, and it would seem to be conceded that this Court has it. When any question arising under procedural law is raised, it will be determined. All that the National Casket Company vs. U. S. 263 Fed. Rep. 246, decides is that the service of the writ was in that case not in accordance with the law, and the motion to set the service aside was granted. The very jurisdiction which is here questioned was there conceded. If the case is cited merely as authority for the doctrine that there is a distinction between jurisdiction and the procedure to be followed, the distinction is established. This leaves untouched however, the question before us which is wholly one of jurisdiction.

The motion to dismiss is denied.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S EXCEPTION TO REFUSAL OF MOTION TO DISMISS—Filed
Feb. 28, 1923

And now, to wit: this 24th day of February, A. D. 1923, comes George W. Coles, Esq., United States Attorney for the Eastern District of Pennsylvania, for the defendant, and excepts to the opinion of the Court filed dismissing Defendant's motion to dismiss for want of jurisdiction.

George W. Coles, United States Attorney.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DEFENSE RAISING QUESTIONS OF LAW—Filed Feb.
28, 1923

The defendant, United States of America, by George W. Coles,
United States Attorney for the Eastern District of Pennsylvania, files
this Affidavit of Defense raising questions of law as follows:

1. The Statement of Claim filed fails to set forth a cause of action
against the United States of America, cognizable in this court.

2. The Act of Congress of August 10, 1917, (40 Stat. L. 276)
Section 10, does not confer on District Courts of the United States
jurisdiction to try any and all claims arising under the Act.

3. The District Courts of the United States have jurisdiction under
the Act only after:

(a) A determination by the President of the value of the prop-
erty taken thereunder.

(b) An expression that the compensation so determined is not
satisfactory to the person entitled to receive the same.

(c) The payment to the claimant of 75% of the amount so de-
termined by the President.

[fol. 17] 4. The only controversies of which the District Court has
jurisdiction under the said Act of Congress are suits against the
United States "to recover such further sum as added to the said
seventy five per centum will make up—just compensation."

5. The District Court does not have jurisdiction to try the claim
of the Plaintiff as filed.

Wherefore the defendant prays the judgment of the Court upon
the questions of law herein raised and if these are sustained that
judgment may be entered for the defendant. If, however, the ques-
tions of law are decided adversely to the defendant, the defendant
prays leave to file an Affidavit of Defense to the averments of fact
contained in the Statement of Claim.

George W. Coles, United States Attorney.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF DEFENSE RAISING QUESTIONS OF LAW
—Filed Mar. 23, 1923

The defendant, United States of America by George W. Coles, United States — for the Eastern District of Pennsylvania files this Supplemental Affidavit of Defense raising questions of law, assigning the following reasons in support of the affidavit of defense raising questions of law heretofore filed:

6. The complaint sets forth a diversion of coal and the provisions of Section 25 of the Lever Act instead of a requisition under Section 10, of the said Act.

7. Plaintiff's remedy, if any, was by a suit against the Agent designated by the President under section 206 (a) of the Transportation Act.

Wherefore, the defendant prays the judgment of the Court upon the additional questions of law herein raised and these are sustained that judgment may be entered for the defendant. If, however, the questions of law are decided adversely to the defendant the defendant prays leave to file an Affidavit of Defense to the averments of fact contained in the Statement of Claim.

George W. Coles, United States Attorney.

[fol. 19] [Title omitted]

SUB AFFIDAVIT RAISING QUESTIONS OF LAW—Filed May 4, 1923

OPINION

DICKINSON, J.:

The First Question

Starting with the doctrine, which is of course accepted that this defendant is subject to the jurisdiction only of that tribunal to whose jurisdiction it has submitted, and that a Court of the United States has only that jurisdiction which the Constitution and laws of the United States have conferred, the first point made (assuming the question of jurisdiction in respect to the proper forum to have been for present purposes determined) is that the Act of Congress of August 10th, 1917 commits to the District Courts the duty of determining to what sum a claimant is entitled only when there has been a taking by the United States and then only when there has been an appraisement and a payment on account, thereby limiting the judicial power to the ascertainment in the words of the Act of the "further sum", which added to what was paid at the time of the

taking will together "make up just compensation". Inasmuch as there is no averment of a payment on account nor of an appraisement, the point made is embraced in the inference drawn that this is not [fol. 20] the character of case, jurisdiction to try which is conferred upon any District Court by the cited Act of Congress.

The verbiage of the Act gives support to the position of the defendant. This literal interpretation, however, does not give us the real meaning of the law. It contemplates a taking of private property for public uses. It recognizes the constitutional right of the owner to "just compensation" and of the possible need of some tribunal to determine it. For this Congress has provided by making it the duty of any District Court, to which application may be made to try the cause. The provisions as to appraisement and payment of the stated percentage was inserted independently of the other question of how "just compensation" was to be determined and was wholly for the benefit of the owner of the property taken. The requirement to pay him the percentage is made absolute and of course the phraseology of the Act implies the partial payment because it was assumed the mandate of the law would be met. Our view however is that the failure of the Executive to follow the directions of Congress does not oust the jurisdiction conferred upon the Courts. They are to determine what sum of money is "just compensation" for the property taken and are to award to the claimant such sum, less, of course, what has been paid. It may be, as counsel for defendant contend, that the words of the Act limit the form of the judgment to one for the retained percentage of "just compensation", leaving the complainant to some other method of getting the sum which Congress has commanded should have been paid on account. This at the most is a trial question which may be ruled as such.

We find no support of the position of the defendant in the cases cited. It is true that in each of these cases there had been a payment on account. There was no room in any of these cases for the [fol. 21] proposition for which defendant stands that the oversight or neglect of the Executive to do what Congress had commanded ousts the jurisdiction conferred upon the District Courts. The circumstances that the rulings made are silent upon a point which could not have been raised does not warrant any inference of what the ruling would have been had the question been raised.

In *United States vs. McGrane*, 270 Fed. Rep., 761 no such question arose.

Benedict vs. United States, 271 Fed. Rep., 714 does not discuss the question.

Nor does *Blake vs. U. S.*, 275 Fed. Rep. 861.

The point in *Greenwich vs. United States* (unreported) was or at least included one essentially different from that now raised, although in some respects akin to it. There was no ruling made by the Court so that there is no guide to us upon the point now made. So far as it bears directly upon the question before us, it supports the jurisdiction of the Court because in that case nothing had been paid and yet the case was not dismissed for want of jurisdiction. The kindred question to which we have referred is one not here raised, and in view of the averments of the declaration could not be raised.

We find the conclusion reached to which the foregoing points is confirmed by the cases to which we have been referred by counsel for plaintiff. These cases are

United States vs. New River, 276 Fed. Rep. 690.
Seaboard vs. United States, 280 Fed. Rep., 349.

The latter case, on appeal to the Supreme Court, was disposed of in an opinion handed down March 5th, 1923.

These cases are wholly inconsistent with any thought that the [fol. 22] District Courts do not have the judicial power to determine what is just compensation in the case of an actual taking.

This takes us to the second question raised.

The Second Question

The second question may most clearly be presented by having it arise out of a short fact statement.

From the viewpoint of defendant the 10th Section of the Lever Act has application to what is in effect the exercise of the power of eminent domain. It contemplates a requisition; unsuccessful efforts to agree upon compensation; a determination by the United States of the sum it would willingly pay and the payment of 75% of that sum on account. The owner of the property which has been taken is then given the right to have his compensation judicially determined, and the duty is imposed upon the District Courts to determine it.

Section 25 of the Act contemplates a wholly different situation. It does not relate to a taking by the United States in the eminent domain sense but the interposition of the aid of the United States in dealing with transportation and supply of fuel under war conditions. Whatever the United States does under Section 25 is an administrative act done in furtherance of the business of transportation companies for them, and in consequence an act to be viewed in law as the act of the Transportation Company.

The point concedes that ultimately the responsibility of payment rests upon the United States, but it is urged that the method of recovery which Congress has indicated and which, for this reason, must be followed is to bring an action against the designated agent who [fol. 23] is the representative of the United States in respect to the particular transportation company concerned.

The inference drawn is that any one who has a right of recovery under Section 25 must pursue it and have the sum payable determined in such an action.

The reply made by the plaintiff is that the question thus raised has already been determined in favor of the plaintiff. The point raised is made to bear upon the facts of the instant case by the observation that although the declaration formally avers a taking under the 10th Section, the declaration as a whole makes it clear that the real fact is that there was no taking under the right of eminent domain within the meaning of the 10th Section but that the complaint is of an administrative act which resulted in a diversion of the shipment from one consignee to another. The answer of the plaintiff to the point made is that it has already been ruled.

The first case cited is Dexter vs. United States, 275 Fed., 566. Judge Morris, in a fully considered opinion, meets the precise question raised. The case was that of demurrer to a petition which set forth a diversion of coal from the consignee to the Pennsylvania Railroad. The authority was that of a requisition by the Director General of the Railroads "acting under an order of the United States Fuel Administrator." The cause of action, as we read that case, was the very cause of action here set forth, and the question raised by the demurrer was the very question here made. The Court there made the finding that this was a taking under the 10th Section of the Lever Act, and overruled the demurrer interposed.

The second case cited was that of Corona Coal Co. vs. United States, 56 Court of Claims Reports, 390. The effort of the claimant [fol. 24] there was to recover under Section 25 of the Lever Act. The very question raised before us by the United States was there raised in reverse, the United States contending that the recovery could be only under Section 10 of the Lever Act. The Court ruled that the Court of Claims had no jurisdiction, and referred the claimant to the District Court.

General Chemical Co. vs. United States Court of Claims No. 34,140, decided January 23rd, 1922, is cited to the same effect.

We have not had access to the report of these Court of Claims cases but accept the statement of counsel as to the rulings made.

In view of this, or indeed of the ruling made by Judge Morris alone, we deem it our duty to apply the same determination to the instant case until it had been authoritatively ruled otherwise. It would be an intolerable situation to permit cases of this character to be brought in one District and for the Court of another District to refuse to entertain them.

We withheld a definite ruling upon this point awaiting a supplemental brief of counsel for the defendant. We are now in receipt of this brief and find that this second question is withdrawn so far as it is comprehended under Paragraph 6 of the affidavit of defence raising these questions of law.

The Paragraph is as follows:

"6. The complaint sets forth a diversion of coal under the provisions of Section 25 of the Lever Act instead of a requisition under Section 10 of the said Act."

Counsel for defendant, however, still presents the question of law raised by paragraph 7 of their affidavit.

This paragraph is as follows:

"7. Plaintiff's remedy, if any, was by a suit against the Agent designated by the President under Section 206 (a) of the Transportation Act."

[fol. 25] We are unable to find any substantial difference (in the light of the above cited cases) between the question raised by Paragraph 6 and Paragraph 7. The distinction is clear enough between the cases in which the United States under its power of

eminent domain takes property for its own purposes and another cause of action which may arise out of an administrative act of the executive relating to an interference with the course of a shipment. The argument based upon this is likewise easily grasped that in the one case Congress has made it the duty of the District Courts to determine the just compensation to which an owner of property taken by the United States for its own use is entitled, but that a claim arising out of such an administrative act is a claim, the legal justice of which the District Courts (otherwise than in special cases) have not had it made their duty to determine. This view, however, would seem to ignore the point of the ruling made in the cited cases.

The declaration in the instant case avers a taking under Section 10 of the Lever Act. It is true that this is accompanied with other averments which makes it clear that the taking was in the form of a diversion of the property from the control of the owner to the possession of some one else designated by an executive administrative act. Such diversion, however, is the very thing which was held in the cited cases to be a taking under Section 10. The point now made by counsel for the United States is that it was not such a taking. The differentiation between the point now pressed and the rulings in the cited cases is that the transportation Act of 1920, being subsequent and in this respect supplementary to the Lever Act, by Section 206 (a) provides that a taking (although a taking under the power of eminent domain and therefore a [fol. 26] taking under Section 10 of the Lever Act as was held in the cited cases) if it was a taking for the purpose of being diverted to some one designated by the executive was the kind of a taking, the remedy for which was by action against the administrative agent of that railroad to which the coal was diverted. The argument does not go beyond procedure features.

The ultimate liability of the United States is not denied. The point made is that Congress by Section 206 (a) of the Transportation Act laid down a policy of the law and a mode of redress which claimant of this particular character should have precisely as by the Lever Act, Congress has prescribed the mode of redress which the plaintiff in this case has pursued.

Our attention has been directed to the practical value of the policy thus adopted by Congress. Under Section 25 of the Lever Act there may have been any number of diversions. The divertees may be scattered all over the United States. The United States being subject to suit under Section 10 of the Lever Act, all these causes of action could be redressed in one action in any District Court of the United States. The practical inconvenience of this was recognized by Congress, and it was accordingly provided by Section 206 (a) of the Transportation Act that in cases of this particular kind of taking the action should be brought not against the United States but against the particular railroad which benefited by the diversion, or more accurately, against the designated agent of such railroad. This has brought it about that an action for taking for the purposes of a diversion would properly be

brought precisely as for a cause of action arising in the course of the operation of the railroad by the United States. It is further pointed out that this point was not made nor is the thought met by anything in the cited rulings. The argument takes us first to the Section 206 (a) of the Transportation Act.

The Final Question

The question we have so designated is final in more respects than one. It is in effect an abandonment of the other positions taken inasmuch as the reliance is now upon the soundness of the proposition that although there is a taking and although that taking is by authority of Section 10 of the Lever Act, Section 206 (a) of the Transportation Act, a later date enactment, differentiates between the two kinds of taking which there may be under the Lever Act and prescribes that in cases of a direct taking of property for the use of the United States, the District Courts may determine the just compensation to which the claimant is entitled, but prescribes also that in cases of what may be called an indirect taking, not for the use of the United States but in the furtherance of the governmental purpose to control transportation, the rights of the claimant shall be determined not through the form of an action against the United States, as it would be under the provisions of the Lever Act, but in the form of what is the equivalent of an action against the particular Transportation Company which has been the recipient of the benefits of the governmental intervention.

As before twice stated there is no denial of the ultimate liability of the United States. The proposition goes only to the procedural right. We recognize the force of the argument which supports the doctrine underlying the proposition advanced. The argument has support not merely in the verbiage of the Act of Congress but also in the practical policy which it can be understood as the motive for enactments having the interpretation thus given to them and which dictated the language employed by Congress. This argument, however, had full application in the cited cases which have been determined and without doubt was given due weight before the conclusion reached was announced.

With respect to what we have called the final question, we see no room for a distinction between the Dexter case and the case at bar, and as a consequence feel impelled, for reasons which lie upon the surface, to follow the ruling made.

Order

We accordingly decline to rule the questions of law raised by the affidavit in favor of the defendant, but grant leave to it to file an affidavit, directed to the fact merits of the case, within fifteen days from the date of the filing of this order.

[fol. 29]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DEFENSE—Filed July 7, 1923

The United States of America, defendant, by George W. Coles, Esq. United States Attorney for the Eastern District of Pennsylvania claims that it has a full, just and complete legal defense to the whole of the Plaintiff's Claim as follows:

I. The allegations in paragraph 1 of the Statement of Claim are neither admitted nor denied, said allegations being conclusions of law. Defendant avers that the Plaintiff has no cause of action against the defendant under Section 10 of the Act of Congress, approved August 10, 1917, 40 Stat. 276, commonly known as the Lever Act, for reasons as will hereinafter appear, that no action was taken by the Plaintiff against defendant under said section of said Act of Congress with respect to the subject matter of this suit.

II. The allegations of paragraph 2 of the Statement of Claim are neither admitted nor denied, the defendant having no information relative to said allegations. The defendant avers that no action was taken by it against the Plaintiff under section 10 of the Lever Act, and claims that the allegations of paragraph 2 of the Statement of [fol. 30] Claim are immaterial so far as this suit is concerned.

III. Defendant denies that the President of the United States acting by and through the Fuel Administrator or in any other manner, or through any other medium, commandeered and requisitioned the coal referred to in paragraph 3 of the Statement of Claim.

Defendant avers that the said coal was purchased under contract from F. R. Long & Co. by the Boston and Maine, and Maine Central Railroads, while under federal control, and used by the said railroads for their general transportation purposes and not used in any way in connection with the common defense.

IV. Defendant denies as aforesaid, that said coal was commandeered and requisitioned from the Plaintiff or from any other person or corporation. Said coal, as aforesaid, was purchased under contract from F. R. Long & Co. and the defendant is in no way liable therefor to the plaintiff in this suit, which is based on alleged commandeering and requisitioning of the said coal from the Plaintiff which is herein specifically denied.

V. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal alleged, this being immaterial in this suit.

VI. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal

alleged, this being immaterial in this suit. Defendant as aforesaid is nowise liable in this action for said coal.

[fol. 31] VII. Defendant denies that plaintiff is entitled to just compensation or other damage for said coal for the reason as aforesaid that the said coal was never commandeered or requisitioned from the plaintiff. Defendant is in no wise liable to the Plaintiff for the value of the same in this action, said coal having been purchased by the two railroads aforesaid, while under federal control, and the coal never having been commandeered or requisitioned by the President of the United States under Section 10 of the Lever Act as alleged.

VIII. Therefore defendant denies liability to the Plaintiff in this suit.

United States of America, by George W. Coles, United States Attorney.

Sworn to and subscribed before me this 6th day of July, 1923.
H. R. Manley, United States Commissioner, Eastern District of Pennsylvania. (Seal.)

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE JURY TRIAL—Filed Oct. 29, 1923

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the Court without the intervention of a jury, in accordance with Sections 649 and 700 of the United States Revised Statutes.

(Sgd.) George W. Coles, United States Attorney. Charles H. Burr, Attorney for —.

Philadelphia, Pa.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXHIBIT IN EVIDENCE

Before Hon. Oliver B. Dickinson, J., Without a Jury

Philadelphia, Pa., November 28, 1923.

Present: Charles H. Burr, Esq., and George Demming, Esq., for plaintiff; Joseph L. Kun, Esq., Assistant U. S. Attorney, for defendant.

Plaintiff's Evidence

Mr. Burr: If Your Honor please, the defendant admits the incorporation of the plaintiff under the laws of the State of Connecticut.

I offer in evidence the following relative parts of the Statement of Claim and the Affidavit of Defense:

Paragraph II of the Statement of Claim, as follows:

"II. Plaintiff was at the times of the transactions hereinafter recited engaged in buying, selling and shipping bituminous coal chiefly for export to foreign countries. All of the coal hereinafter referred to and which is the subject matter of this suit was purchased by plaintiff under good and valid contracts made long prior [fol. 34] to October 30, 1919, and had been sold by plaintiff for export prior to October 30, 1919. Plaintiff had procured its shipment by his vendor, the Jamison Coal & Coke Company to tidewater for export early in October 1919, and Prior to October 30, 1919, it was lying either at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, whither it had been sent by the Railroad Administration through its agents."

Paragraph II of Affidavit of Defense, as follows:

"II. The allegations of paragraph 2 of the Statement of Claim are neither admitted nor denied, the defendant having no information relative to said allegations. The defendant avers that no action was taken by it against the Plaintiff under section 10 of the Lever Act, and claims that the allegations of paragraph 2 of the Statement of Claim are immaterial so far as this suit is concerned."

The last paragraph of the third numbered paragraph of the Statement of Claim, as follows:

"III. * * *

All of the aforesaid coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense."

[fol. 35] The last clause of Paragraph III of the Affidavit of Defense, as follows:

"III. * * *

Defendant avers that the said coal was purchased under contract from F. R. Long & Co. by the Boston and Maine, and Maine Central Railroads, while under federal control, and used by the said railroads for their general transportation purposes and not used in any way in connection with the common defense."

The fourth paragraph of the Statement of Claim, as follows:

"IV. The said coal was purchased and held at the said piers by plaintiff for export; and the fair and reasonable values and true market prices of said coal so commandeered and requisitioned as aforesaid, at the times and places and in the quantities as aforesaid, were as stated in "Exhibit A" hereto attached; and were not less than the price assumed to be fixed by the Fuel Administrator for New River Coal for export, to wit: \$4.536 per gross ton f. o. b. mines."

The fourth paragraph of the Affidavit of Defense, as follows:

"IV. Defendant denies as aforesaid, that said coal was commandeered and requisitioned from the Plaintiff or from any other person or corporation. Said coal, as aforesaid, was purchased under [fol. 36] contract from F. R. Long & Co. and the defendant is in no way liable therefor to the plaintiff in this suit, which is based on alleged commandeering and requisitioning of the said coal from the Plaintiff which is herein specifically denied."

Paragraph V of the Statement of Claim, as follows:

"V. During the whole of the period during which said coal was commandeered and requisitioned from plaintiff, there was a ready and constant market for said coal at said Port Richmond Piers and Port Reading Piers, where said requisitions were made from plaintiff, and said coal was then and there being continuously sold in large quantities."

Paragraph V of the Affidavit of Defense, as follows:

"V. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal alleged, this being immaterial in this suit."

Paragraph VI of the Statement of Claim, as follows:

"VI. Plaintiff avers that the best measure of just compensation for private property commandeered and requisitioned by the United States of America as in the present case, is the fair market value thereof at the time and place of delivery as shown by the current market price in transactions of purchase and sale. Plaintiff avers [fol. 37] that fair market values and current market prices of the coal commandeered and requisitioned by the United States as aforesaid, are as stated in "Exhibit A" hereto attached. But plaintiff further avers that the said coal had been sold by plaintiff for export prior to October 30, 1919, and that the net prices at which plaintiff so sold were in excess of said price of \$4.536 per gross ton f. o. b. mines; and that if a market as averred did not exist as alleged and believed, plaintiff is entitled to recover the said net prices at which plaintiff had sold."

Paragraph VI of the Affidavit of Defense, as follows:

"VI. Defendant denies as aforesaid that said coal was commandeered or requisitioned from plaintiff. Defendant neither admits nor denies that there was a ready or constant market for said coal alleged, this being immaterial in this suit. Defendant as aforesaid is no wise liable in this action for said coal."

I also offer in evidence the first paragraph of Paragraph III of the Statement of Claim, with the exhibit thereto attached, as follows:

"III. By virtue of the authority conferred by the aforesaid Act of Congress, the President of the United States, acting by and through the Fuel Administrator at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, commandeered and requisitioned a certain necessary fuel, namely, bituminous coal, owned by the [fol. 38] plaintiff at the times and in the quantity set forth in a true and correct statement thereof hereto attached and made a part hereof, marked "Exhibit A".

"EXHIBIT A TO EXHIBIT IN EVIDENCE

Coal Requisitioned by Fuel Administrator

Dates, 1919	Gross tons	Market prices f. o. b. mines	Amount
Nov. 12.....	828.16	\$4.536	\$3,756.53
Nov. 17.....	753.66	4.536	3,418.60
Nov. 18.....	1,397.37	4.536	6,338.47
Nov. 26.....	337.40	4.536	1,530.45
Nov. 29.....	288.31	4.536	1,307.77
Dec. 16.....	236	4.536	1,070.50
	<hr/>		<hr/>
	3,840.90		\$17,422.32

Notices of said requisitions were given under dates of December 12, 1919, and December 18, 1919."

I also offer in evidence the first paragraph of Paragraph III of the Affidavit of Defense, showing no contradiction of the figures set forth in the said exhibit, as follows:

"III. Defendant denies that the President of the United States acting by and through the Fuel Administrator or in any other manner, or through any other medium, commandeered and requisitioned the coal referred to in paragraph 3 of the Statement of Claim."

[fol. 39] Now, if your Honor please, we have here a list of all the documents which have been agreed to by Mr. Kun and myself for admission.

I offer in evidence telegram from O. W. Stager to O. H. Hagerman, Port Richmond, Dated November 10, 1919.

(Copy of telegram marked "Plaintiff's Exhibit 1.")

I offer in evidence, as "Plaintiff's Exhibit 2," letter from Wm. Brown, Shipping & Freight Agent, to O. W. Stager, under date of December 12, 1919, with attached list of car numbers which counsel for plaintiff and counsel for defendant agree are the car numbers making up the amounts set forth in the exhibit attached to plaintiff's claim, with the exception that the total amount of tonnage to be recovered is 3,757 tons.

I offer in evidence, as "Plaintiff's Exhibit 3," a letter from Wm. Brown to O. W. Stager, under date of December 18, 1919.

I offer in evidence, as "Plaintiff's Exhibit 4," telegram from G. N. Snider to J. W. Howe, under date of November 8, 1919.

I offer in evidence, as "Plaintiff's Exhibit 5," letter from J. W. Howe, Commissioner, to G. N. Snider, under date of November 10, 1919.

I offer in evidence, as "Plaintiff's Exhibit 6," telegram from L. W. Baldwin, Regional Director, to J. W. Howe, under date of November 11, 1919.

[fol. 40] I offer in evidence, as "Plaintiff's Exhibit 7" telegram from J. W. Howe, to L. W. Baldwin, Regional Director, under date of November 11, 1919.

I offer in evidence, as "Plaintiff's Exhibit 8," telegram from W. T. Lamoure, to J. W. Howe, under date of November 14, 1919.

I offer in evidence, as "Plaintiff's Exhibit 9," seven orders of Tidewater Coal Exchange directed to Wm. Brown, Acting Agent, Port Reading Coal Pier, under dates of November 8, November 8, November 15, November 15, November 15, November 25 and December 12, 1919, under which the cars were included which are set forth in "Plaintiff's Exhibit 2."

I offer in evidence as "Plaintiff's Exhibit 10" five telegram- from W. T. Lamoure, to J. W. Howe, Commissioner, Tidewater Coal Ex- change, numbered respectively 1318, 1481, 1519, 1620 and 739.

I offer in evidence, as "Plaintiff's Exhibit 11," order from L. W. Baldwin, Regional Director, to Charles H. Ewing, Federal Manager, dated November 8, 1919.

Mr. Kun: If the court please, I object to the introduction in evidence of the exhibits offered on the ground that they are irrelevant, and immaterial in this suit, the suit being one under Section 10 of the Lever Act, and the exhibits offered showing on their face that they were not requisitions, to use the language of Seetion 10, "by the [fol. 41] President for supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense," the right to requisition under Section 10 of the Lever Act being limited to the purposes which I have just stated.

The Court: As the objection made is for the purpose of raising a question which goes to the rights of the present action, we will now

admit the evidence subject to the objection, reserving the right and power to rule upon it along with any other questions of law or fact which may arise in the cause and then determine whether the evidence is admissible or inadmissible, allowing now an exception to that party against whom the final ruling may be made, and passing upon it, if the evidence is inadmissible, as upon a motion to strike it out.

Mr. Burr: It is admitted between counsel for the plaintiff and the defendant that the offices held by the various parties signing the documents already offered in evidence were as follows:

J. W. Howe, Commissioner Tidewater Coal Exchange.

L. W. Baldwin, Regional Director of the United States Railroad Administration.

W. T. Lamoure, Chairman of the Subcommittee of the Eastern Regional Coal Committee, located at Boston.

The Court: What is the Coal Committee?

[fol. 42] Mr. Burr: Mr. Robertson can explain that.

Mr. Robertson: The Coal Committee was one of several organized by the Director General of Railroads to carry out the instructions contained in the Fuel Administrator's order of October 31, 1919.

Mr. Burr: And the same statement applies to Mr. Baldwin's office as Regional Director?

Mr. Robertson: Certainly, he was the representative of the Director General of Railroads.

Mr. Burr: To carry out the orders of the Fuel Administrator.

Mr. Robertson: Yes, sir.

Mr. Burr: Who was G. N. Snider?

Mr. Robertson: He was Chairman of the Eastern Regional Coal Committee, located at New York, under the Director General of Railroads, to carry out the orders of the Fuel Administrator.

Mr. Burr: Wm. Brown was Shipping and Freight Agent in charge of the piers at Port Reading.

O. W. Stager was Chairman, Bituminous Coal Distribution Committee at Philadelphia and also Superintendent Transportation, Philadelphia & Reading Railway at Philadelphia.

O. H. Hagerman held the same office at Port Richmond as Mr. Brown held at Port Reading.

[fol. 43] The Court: What does Port Reading mean?

Mr. Burr: Port Reading is the place in New Jersey where the coal went to.

I offer in evidence, as "Plaintiff's Exhibit 12," telegram addressed to L. W. Baldwin, Regional Director, Allegheny Region, signed by Walker D. Hines, Director General of Railroads, under date of October 31, 1919.

I also offer in evidence as "Plaintiff's Exhibit 12-a," letter accompanying copy of said telegram and explaining same, signed by L. W. Baldwin, Regional Director, and addressed to certain Federal Managers, under date of November 1, 1919.

Mr. Kun: I make a like objection to this offer as in the case of the previous offers.

The Court: A like ruling will apply.

RICHARD A. C. MAGRUDER, sworn and examined as follows:

Mr. Kun: I ask for an offer of proof.

Mr. Burr: I offer to prove by this witness that he was the Deputy Commissioner of the Tidewater Coal Exchange during the period that is concerned in the suit; that he was the operating head in New York of the Tidewater Coal Exchange during this period. I desire to show by this witness the method under which the Tidewater Coal [fol. 44] Exchange operated, its nature, and functions, for the purpose of showing how, physically, the handling of the coal which is the subject of the documents already offered in proof was done.

Mr. Kun: This offer is objected to on the ground that it has not been offered to be shown that the exchange of which the witness was the head was in any way authorized by the President to participate in the requisitioning of the coal in question, as necessary to the support of the Army or the maintenance of the Navy or any other public use connected with the common defense.

The Court: A like ruling to the ruling made on the previous offers will apply here.

By Mr. Burr:

Q. Mr. Magruder, we will begin, I think, by asking you if you have with you any documents showing the relation of the Government or the Fuel Administrator or the Railroad Administration to the Exchange?

A. I have the rules of the Exchange showing the approval of the Exchange by the Fuel Administration, and I have copies of the orders of the Railroad Administration in connection with the utilization of the exchange for the distribution of coal during the period in question.

Q. Will you produce those orders?

A. This is the rules containing the United States Fuel Administrator's order making the use of the Exchange compulsory. [fol. 45] Q. Have you any other documents on the question of these rules?

A. That is the only one bears on the rules of the United States Fuel Administration directed to the Exchange. The next is the order of the United States Railroad Administration commandeering the Exchange. That is contained in a letter of November 2, 1919, from L. W. Baldwin, Regional Director, to his Federal Managers.

Mr. Burr: I offer in evidence as "Plaintiff's Exhibit 13," letter from L. W. Baldwin, Regional Director, addressed to certain Federal Managers, under date of November 2, 1919, and point out that this letter directs that the Tidewater Coal Exchange should be utilized for the shipment of coal.

Mr. Kun: A like objection is made to this offer.

The Court: A like ruling will apply.

Mr. Burr: I offer in evidence the order of H. A. Garfield, United States Fuel Administrator, under date of November 6, 1917, relating to the functions of the Tidewater Coal Exchange, together with the

attached copy of the Tidewater Coal Exchange Rules, as "Plaintiff's Exhibit 14."

Mr. Kun: A like objection is made to this offer.

The Court: A like ruling will apply.

By Mr. Burr:

Q. Will you just tell please first your connection with the Tidewater Coal Exchange and then the history of the Tidewater Coal Exchange, what it was, and its method of functioning?

A. I was employed by the Tidewater Coal Exchange in Washington on July 9, 1917, as Chief Clerk to the Commissioner, located at Washington, and remained in that position until the close of the Exchange on April 30, 1920, having subsequently moved to New York as of May 1, 1919.

The original Tidewater Coal Exchange was created at the request of The Council of National Defense by the shippers and transshippers of bituminous coal and the tidewater railroads handling such coal at the tidewater ports of New York, Philadelphia, Baltimore and Hampton Roads, for the purpose of expediting the release of cars at those ports in the loading of vessels, so as to increase the car supply on the railroads in order to increase the production of coal which was moving and necessary to win the war. The idea was to classify all the coals from the various mines into pools, according to the grades and general characteristics, and have the coal consigned to the Exchange for the account of its owner and generally distributed by the Exchange without regard to the original ownership, in order to avoid delay in waiting for the owner's own coal to arrive for his particular vessel. This was purely a voluntary association at first and commenced to function July 15, 1917, but, as shown in the last exhibit, Dr. Garfield, United States Fuel Administrator, in his [fol. 47] order of November 6, 1917, made it compulsory for all shippers to ship their coal to the Exchange and be governed by its rules, and the tidewater railroads agreed to pay the operating expenses of the Exchange for the benefits they derived therefrom in the way of car saving.

When the Railroad Administration came into existence on January 1, 1918, it approved shortly thereafter of the railroad contracts and continued to support the Exchange until the Railroad Administration went out of existence as of February 29, 1920. Dr. Garfield's order compelling all shipments to go through the Exchange was cancelled as of March 1, 1919, but the Exchange continued in operation until April 30, 1920, by voluntary membership.

On November 1, 1919, as shown by Exhibit 13, the Regional Director of the Allegheny Region of the United States Railroad Administration commandeered the Tidewater Coal Exchange at all three of the Allegheny ports, New York, Philadelphia and Baltimore, for the purpose of aiding in the distribution of coal, giving the Exchange full jurisdiction over the distribution of coal for trans-shipment. Following this order the Regional Director, through its Coal Committees, provided a form of application, known as "CX" on

which all consumers of coal made application to the Tidewater Coal Exchange for the coal required, naming thereon the coal supplier [fol. 48] through whom they desired to obtain the coal, and this Form CX contained the agreement to pay for the coal. This application would be either approved, modified or disapproved by the Commissioner of the Exchange, J. W. Howe, and, when approved, would be forwarded to the Subcommitteeman at Philadelphia, who, in turn, would forward it, with his recommendation, to the Regional Coal Committee in Philadelphia, which, if it saw fit, would issue a permit to deliver the specified quantity of coal on the order. This permit would be returned to the Tidewater Coal Exchange, which would place the order with the Pier Agent of the railroad company to load the coal on the particular boat for the account of the party making the application or his supplier of coal.

This was the method of handling this coal at New York during this period, but the coal for New England, for a period of five or six weeks, was handled on the direct telegraphic request of W. T. Lamoure, Chairman of the New England Subcommittee, located at Boston. On receipt of such telegrams from Mr. Lamoure the Exchange would place the orders direct with the pier, without the approval of the Regional Coal Committee at Philadelphia.

Cross-examination.

Br. Mr. Kun:

Q. If a railroad under Federal control required coal, would it proceed in any different way from any other corporation to get coal through your Exchange or did they have to go through the same form?

[fol. 49] A. The rules then in existence, as I understand it, the railroad would make its application to the proper Coal Committee, the same as any other consumer.

Mr. Burr: There have been decisions of the United States Supreme Court recently which make me feel that I should ask Your Honor to take judicial notice of the relative orders of the Fuel Administrator which I have had printed, and I will therefore offer in evidence, as "Plaintiff's Exhibit 15" the various orders of the Fuel Administrator which are relevant in this case.

Mr. Kun: I have no objection to that.

Plaintiff rests.

Defendant's Evidence

Mr. Kun: On behalf to the defendant, I introduce in evidence, with the consent of the other side, for the better understanding of the case by Your Honor, a graphic chart which I have had prepared showing the origin of the coal and just how it got to these railroads, and the various typical orders under which it got there.

(Chart and papers attached thereto marked "Defendant's Exhibit 1".)

[fol. 50] The defendant offers to prove, in accordance with the allegation in the Affidavit of Defense that the coal, to cover the price of which the suit is brought, was actually paid for, by the railroads in question who used the coal, to F. R. Long & Co., as whose coal it was diverted to the railroads, the diversion orders already introduced in evidence showing that the coal was ordered dumped into F. R. Long & Co.'s barges by these very orders which are in evidence.

Mr. Burr: We admit the payment to F. R. Long & Co. of certain sums for the coal in suit. I object to the offer of proof on the ground that it is irrelevant to show payment to a third party, and further, that, as a conclusion from the documentary evidence offered, the diversion, as my friend calls it, or requisition, as I call it, was made to the railroads and not F. R. Long & Co.

Defendant rests.

Testimony closed.

[fol. 51]

PLAINTIFF'S EXHIBIT No. 1

United States Railroad Administration

Director General of Railroads

Philadelphia and Reading Railroad, Atlantic City Railroad, Port
Reading Railroad

Time Written: 3.17 M.

Mailgram

Phila., November 10, 1919.

O. H. Hagerman, Port Richmond:

Confirming phone order, Reconsign two hundred (200) cars pools 33 and 34 bituminous coal Port Richmond Piers to same consignment Port Reading Piers. Also fifth (50) cars pool 37 bituminous coal to same consignment Port Reading, N. J. with all charges following and issue letter of transfer.

O. W. Stager

Form Ck. HCE. #3.

PLAINTIFF'S EXHIBIT NO. 2

Port Reading, N. J., Dec. 12, 1919.

Our File No. 1-1.

Mr. O. W. Stager, Supt. Transportation.

[fol. 52] DEAR SIR: Eighty-four cars Bituminous coal originally consigned to the Jamison C. & C. Co., at Port Richmond Piers, Phila., and reconsigned to their account at this point, authority Bituminous Coal Distribution Committee, have been reconsigned to Messrs. [F. R. Long & Co.,]* at this point and dumped over our piers into vessels account last named shipper.

Attached herewith please find car numbers, weights, etc.

Yours truly, Wm. Brown, Shipping & Freight Agent.

Copies to Mr. E. B. Crosley,

" P. J. Kelly,
" J. W. Howe,
" Jamison C. & C. Co.,
" F. R. Long & Co.

84 Cars Reconsigned from Jamison C. & C. Co. to F. R. Long & Co.

Int.	No.	Weight	Consignor
B. & O.	229575	45.00	Simpson Ck. C. Co.
N. Y. C.	302990	39.07	" "
N. & W.	91943	40.06	Md. C. C. Co.
C. & O.	58328	40.10	Simpson Ck. C. Co.
L. V.	15441	40.01	" "
N. H.	56598	40.07	" "
Erie	23103	44.00	" "
B. & O.	21349	41.03	" "
[fol. 53] B. & O.	221471	44.01	Simpson Ck. C. Co.
N. Y. C.	114808	42.14	Md. C. Co.
N. Y. O. W.	10457	44.01	Simpson Ck. C. Co.
N. Y. C.	408158	39.07	" "
B. & O.	27605	43.01	Md. C. Co.
W. M.	7018	40.03	"
C. & L.	2575	44.05	"
N. Y. O. W.	18230	44.01	Simpson C. & C. Co.
Rut.	10015	42.10	" "
B. & L. E.	43630	44.02	" "
B. & O.	231747	43.18	" "
Erie	32300	44.14	" "
P. & L. E.	4306	40.10	" "
C. N. J.	63254	47.11	" "
P. & R.	71459	45.07	" "

[*Words enclosed in brackets erased in copy.]

Int.	No.	Weight	Consignor
C. N. J.....	63336	47.11	Simpson C. & C. Co.
C. & O.....	56258	42.08	" "
N. H.....	120636	46.04	" "
P. L.....	738591	43.16	" "
Big 4.....	74347	43.14	" "
H. B. T.....	3580	45.03	" "
P. & R.....	87108	48.19	" "
N. & W.....	78208	43.08	" "
B. & O.....	229776	44.15	" "
D. L. W.....	73543	39.14	Md. C. Co.
[fol. 54] W. M.....	8831	41.11	Md. C. Co.
B. & O.....	26027	39.11	" "
B. & A.....	23367	43.12	" "
B. & O.....	131422	44.08	Simpson Ck. C. Co.
C. N. J.....	61923	43.18	" "
B. & O.....	133857	58.13	" "
P. & R.....	26990	30.00	Md. C. Co.
N. Y. C.....	338226	44.18	" "
B. & O.....	222388	43.03	" "
P. & R.....	26257	29.12	" "
B. & O.....	128931	45.13	Simpson Ck. C. Co.
Erie.....	24850	37.06	" "
P. R. R.....	288622	39.10	" "
P. McK. & Y.....	62998	47.02	Md. C. Co.
B/4.....	73528	42.14	" "
B. & O.....	124451	48.11	Simpson Ck. C. Co.
P. & R.....	27174	31.14	" "
H. V.....	29230	45.14	" "
B. R. & P.....	16283	39.11	" "
B. & O.....	320270	45.13	" "
C. & O.....	24693	44.08	" "
N. Y. C.....	405558	43.19	" "
P. R. R.....	158367	44.03	" "
B. & O.....	24643	42.11	" "
P. L.....	704941	43.16	" "
[fol. 55] N. & W.....	84637	40.03	Simpson Ck. C. Co.
W. M.....	7524	42.09	" "
P. & R.....	77823	48.13	" "
".....	77397	49.02	" "
N. & W.....	84927	39.13	" "
P. L.....	695186	44.14	" "
".....	702549	44.08	" "
N. Y. C.....	412832	40.10	" "
B. & O.....	125057	42.17	" "
T. O. C.....	28106	43.10	" "
P. R. R.....	253234	43.05	" "
B. R. & P.....	55410	45.19	" "
".....	40340	44.13	" "
D. L. & W.....	74084	41.01	" "

Int.	No.	Weight	Consignor
L. V.	19362	40.17	Simpson Ck. C. Co.
M. C.	8714	41.15	" "
B. & O.	127448	43.18	" "
B. & L. E.	43368	43.10	" "
B. R. & P.	42984	44.09	" "
P. & R.	85822	42.04	" "
B. & O.	320202	45.17	" "
Shaw	17593	49.02	" "
P. & L. E.	50798	44.11	" "
"	51743	43.02	" "
P. L.	166495	45.07	" "
[fol. 56] N. & W.	84637	40.03	Simpson Ck. C. Co.
W. M.	7524	42.09	" "
P. & R.	77823	48.13	" "
"	77397	49.02	" "
N. & W.	84927	39.13	" "
P. L.	695186	44.14	" "
"	702549	44.08	" "
N. Y. C.	412832	40.10	" "
B. & O.	125057	42.17	" "
T. O. C.	28106	43.10	" "
P. R. R.	253234	43.05	" "
B. R. & P.	55410	45.19	" "
"	40340	44.13	" "
D. L. & W.	74084	41.01	" "
L. V.	19362	40.17	" "
M. C.	8714	41.15	" "
B. & O.	127448	43.18	" "
B. & L. E.	43368	43.10	" "
B. R. & P.	42984	44.09	" "
P. & R.	85822	42.04	" "
B. & O.	320202	45.17	" "
Shaw	17593	49.02	" "
P. & L. E.	50798	44.11	" "
"	51743	43.02	" "
P. L.	166495	45.07	" "
[fol. 57] P. & R.	86007	48.15	Simpson Ck. C. Co.

3,632.10 Tons

Waybill

	Date		Date
No. 33.....	10/ 7/19	No. 92.....	10/15/19
32.....	"/15/19	59.....	10/11/19
30.....	10/ 6/19	58.....	10/ 4/19
38.....	10/ 7/19	57.....	10/11/19
47.....	10/ 9/19	84.....	10/15/19
109.....	10/11/19	83.....	10/15/19
61.....	"	81.....	"
85.....	10/15/19	89.....	"
87.....	"	92.....	"
157.....	"	94.....	"
89.....	"	91.....	"
86.....	10/14/19	90.....	"
154.....	10/15/19	88.....	"
155.....	"	128.....	10/14/19
156.....	"	131.....	"
97.....	"	132.....	"
95.....	"	118.....	10/19/19
96.....	"	28.....	10/14/19
93.....	"	78.....	10/13/19

[fol. 58]

	Date		Date
82.....	10/14/19	28.....	10/ 7/19
120.....	"	29.....	"
119.....	"	30.....	"
121.....	"	31.....	"
122.....	"	32.....	"
26.....	10/19/19	16.....	10/ 4/19
25.....	10/14/19	50.....	10/ 9/19
24.....	"	39.....	10/ 8/19
195.....	10/18/19	38.....	"
196.....	"	36.....	"
31.....	10/15/19	88.....	10/15/19
33.....	"	86.....	"
30.....	"	91.....	"
29.....	"	87.....	"
32.....	10/ 7/19	85.....	"
36.....	"	90.....	"
35.....	"	29.....	"
34.....	"	83.....	"
33.....	"	93.....	"
27.....	"		
28.....	"		
26.....	"		
17.....	10/ 4/19		
39.....	10/ 7/19		
38.....	10/ 7/19		
30.....	"		
31.....	"		

[fol. 59]

PLAINTIFF'S EXHIBIT No. 3

Port Reading, N. J., Dec. 18, 1919.

Our File No. 1-L.

Mr. O. W. Stager, Supt. Transportation.

DEAR SIR: Three cars Bituminous coal originally consigned to Jamison C. & C. Co., at Port Richmond Piers, Phila. and reconsigned to their account at this point, authority Bituminous Coal Distribution Committee, have been reconsigned to F. R. Long & Co., at this point and dumped over piers into vessel's account last named shipper. Below please find car numbers, weights, etc.,

Int.	No.	Wt.	Consignor	Waybill	Date
P. & R.	87178	43.03	Simpson Ck. Co. Co., . . .	No. 62	10/11/19
W. M.	8343	43.09	"	3	10/ 3/19
C. & C.	1827	35.05	"	74	<u>10/14/19</u>
				<u>121.17</u> tons	

Yours truly, Wm. Brown, Shipping and Frt. Agt.

PLAINTIFF'S EXHIBIT No. 4

Western Union Telegram

Received at ____.
M. 193. CPD. HI. CAK.

UD. New York, N. Y. 731P. Nov. 8 1919.

[fol. 60] J. W. Howe, Commissioner Tidewater Coal Exchange, 149 Broadway, New York City:

In order to expedite handling requisitions for Tidewater coal for New England will hereafter be made direct upon you by W. T. Lamoure Chairman of our Boston subcommittee and should be honored exactly the same as if coming from this committee Please acknowledge and advise if you will handle accordingly file AK183.
G. N. Snider. 838P.M.

PLAINTIFF'S EXHIBIT 5

New York City, Nov. 10, 1919.

Mr. G. N. Snider, Coal Traffic Manager New York Central Railroad, Grand Central Terminal, New York City.

DEAR SIR: Acknowledging receipt of your wire of the 8th instant stating that in order to expedite handling requisitions for Tidewater

coal from New England, applications will be forwarded direct to me by W. T. Lamouse, Chairman, Boston Committee, and that same should be honored the same as if coming from your Committee.

I think this arrangement will prove satisfactory.

J. W. Howe, Commissioner.

[fol. 61]

PLAINTIFF'S EXHIBIT 6

Dictated over telephone by GK PRR 11.15 a. m.

Philadelphia, Pa., Nov. 11, 1919.

J. W. Howe:

In order to expedite handling, requisition for Tidewater Coal for New England will hereafter be made direct upon you from W. T. La Moure, Chairman, Boston Sub-Committee and should be honored. Please acknowledge receipt and handle accordingly. File C-C-4-1591.

(Signed) L. W. Baldwin, Regional Director.

PLAINTIFF'S EXHIBIT 7

Postal Telegraph & Cable Co.

New York, Nov. 11, 1919—mj, 11:30 a.m.

L. W. Baldwin, Regional Director USRR Administration, Philadelphia, Pa.:

Acknowledging your telegram eleventh file C-C-four dash fifteen ninety one relative requisition for Tidewater coal for New England direct upon me from La Moure.

J. W. Howe.

[fol. 62]

PLAINTIFF'S EXHIBIT 8

Western Union Telegram

Received at — 1919 Nov. 14, am 11 18.

1919, Nov. 14, a. m. 11.09

K28B CAK.

H N Boston Mass 104 5a 14.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg., New York, N. Y.:

Following from Regional Committee quote confirming telephone conversation today continue to requisition Tidewater coal just as heretofore but without regard to storage on hand file AK six one four end of quote Please cancel my wire yesterday

W. T. Le Moure.

PLAINTIFF'S EXHIBIT 9

No. 722

Tidewater Coal Exchange, 611 Singer Building, New York

Date: Nov. 8, 1919.

Mr. Wm. Brown, Acting S. & F. Agent, Port Reading Coal Pier.

DEAR SIR: You are authorized to load for account of F. R. Long
 [fol. 63] 1325 Tons from Pool all #34 bal 33 Boat "Shickshinny."
 (Confirming telephone conversation.)

Credit O. K.

Consigned to Maine Central R. R.
 Portland, Me.

Priority A.

Yours truly, J. W. Searles, Deputy Commissioner, per J. T.
 Brower.

Authority of W. T. Lamoure.

Duplicate.

11-e.

No. 723

Tidewater Coal Exchange

Nov. 8, 1919.

Mr. Wm. Brown, Port Reading Coal Pier.

DEAR SIR: You are authorized to load for account of F. R. Long &
 Co., 2,000 Tons from Pool 34 Boat "Forest Belle."

Credit O. K.

Consigned to Boston & Me R. R.
 Mystic Wharf, Boston, Me.

Priority A

11 C.

Per J. B. Herron.

[fol. 64]

No. 962

Tidewater Coal Exchange

November 15, 1919.

Mr. Wm. Brown, Port Reading Coal Pier.

DEAR SIR: You are authorized to load for account of F. R. Long &
 Company 1,100 Tons from Pool 34 Boat Hatteras, consigned to
 Boston & Maine Railroad, Boston, Mass.

Authority by W. T. Lamoure.

O. K.

11-e.

Per J. Brower.

No. 968

Tidewater Coal Exchange

Nov. 15, 1919.

Mr. Wm. Brown.

DEAR SIR: You are authorized to load for account of F. R. Long & Company, 1,100 Tons from Pool 34, Bt. Camden, consigned to Boston & Maine R. R., Boston, Mass.

[fol. 65] Mystic Wharf.

Authority by W. T. Lamoure.

O. K.

11-e.

Per J. Brower.

No. 967

Nov. 15, 1919.

DEAR SIR: You are authorized to load for account of F. R. Long & Company 1,100 Tons from Pool 34, Upton.

J. W. Searles, per T. J. Brower.

Consign to Main Central R. R., Portland, Maine.

Authority by W. T. Lamoure.

11-e.

No. 746

Nov. 25, 1919.

DEAR SIR: You are authorized to load for account of F. R. Long Co., 1,100 Tons from Pool 33-34-44, Bt. Pohatcong.

Consign to Boston & Maine Railroad, Boston, Mass.

[fol. 66] Credit O. K.

Authority of W. T. Lamoure.

11-e.

Per T. J. Brower.

No. 1313

Dec. 12, 1919.

DEAR SIR: You are authorized to load for account of F. R. Long & Co., cargo — Tons from Pool #33-34-35-37-44, bal. 18, Boat "Forest Belle."

Credit O. K.

Consigned to Boston & Me. R. R., Mystic Wharf, Boston, Mass.

Emergency order authority O. W. Stager.

11-C.

PLAINTIFF'S EXHIBIT 10

Western Union Telegram

F222 BCAK.
Boston, Mass.

Nov. 25, 1919.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg.,
New York, N. Y.:

Our wire fourteenth cancel permits Shamokin and Hopatecong
and substitute barges Oxford and Upton eleven hundred each load by
F. R. Long Co. Port Reading consigned Maine Central Railroad
[fol. 67] Portland Me. Classification A No. CX forms here.

W. T. Lamoure.

Nov. 14, 1919.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg.,
New York:

Recommend permits barges Shamokin and Hopatecong both eleven
hundred tons loading Port Reading by R. F. Long & Company
consigned Maine Central Railroad Portland Maine.

W. T. Lamoure.

Nov. 14, 1919.

J. W. Howe, Commissioner Tid-water Coal Exge., Singer Bldg.,
New York, N. Y.:

Recommend permits barges Camden and Hatteras 1,100 tons each
load Port Reading by F. R. Long and Co. consigned Boston and
Maine Railroad Boston Massachusetts barges left Boston today.

W. T. Lamoure.

Nov. 26, 1919.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Bldg.,
New York:

[fol. 68] Recommend permit barges Hopatecong and Strafford 1,100
each load by F. R. Long Company Port Reading consigned Boston
and Maine Railroad Boston Mass classification "A" No. CX forms
here.

W. T. Lamoure.

J. W. Howe, Commissioner Tidewater Coal Exchange, Singer Build-
ing, New York, N. Y.:

Our wire twenty fifth substitute barge Pohatecong for Hopatecong
no other change.

W. T. Lamoure.

PLAINTIFF'S EXHIBIT 11

United States R. R. Administration

Regional Committee

Consecutive No. R 617

Phila., Pa., Nov. 8, 1919.

Mr. Charles H. Ewing, Federal Manager, Phila. & Reading R. R.,
Phila., Pa.:

Please deliver railroad fuel coal or held commercial coal as follows:
To B. and M. and Maine Central Barges Request Shickshinny and
Amplere Railroad.

At (point of interchange) Port Reading.
[fol. 69] No. of cars: Sufficient to meet requirements.

Size and Grade of Bituminous Coal: Shipped from Harrison, W. Va.

Remarks.—Also release sufficient coal at Port Liberty to bunker
tug boats moving above barges.

(Signed) L. W. Baldwin, Regional Director.

83 Q NE

New York, Nov. 6, 1919.

J. B. Fisher, Phila.:

Requisition #6, please release coal at Port Reading Account F. R. Long Co., For B. & M. and Maine Central Barges Request Shickshinny and Amplere. Coal comes from Harrison, W. Va., also please release coal at Port Liberty to Bunker Tug Boats to move above barges. Advise if this requisition will be honored.

G. N. Snider.

PLAINTIFF'S EXHIBIT 12

United States Railroad Administration

Director General of Railroads

Allegheny Region

November 1, 1919.

Mr. Elisha Lee, Mr. C. W. Galloway, Mr. C. H. Ewing, Mr. G. L. [fol. 70] Peck, Mr. R. N. Gegien, Mr. Ralph Peters, Mr. E. H. Utley, Mr. A. M. Darlow, Federal Managers.

GENTLEMEN: I enclose herewith copy of a telegram received from the Director General covering instructions to govern the distribution

of coal taken under order of October 31st, and desire to call your attention to several features of these instructions.

Under Item 1 it will be noticed that the Regional Coal Committee will have a representative of the Fuel Administration as one of its members.

Under Item 4 we desire that all the correspondence files, records and other data including the records in the office of the Freight Claim Agent of any claims which may reach him, regarding the distribution of coal, be kept separate from your general files so that in the event it is desired for any purpose to examine the records of any railroad in the matter of this distribution of coal the files may be taken bodily from your records and be complete in themselves.

Under Item 7, it is contemplated that coal will be delivered to [fol. 71] commercial consumers only on specific authority from coal Committee having jurisdiction which, in this case, is the Regional Coal Committee. We can not escape the conviction that there must arise emergency conditions which will require prompt handling, and to cover such conditions Federal Manager may, until further advised, fill emergency requirements which demand immediate attention, and report to the Regional Coal Committee their action and the reasons therefore.

Item 8. The Regional Coal Committee is composed of the following:

Mr. J. B. Fisher, Transportation Assistant, Chairman.

Mr. E. H. Bankard, Chairman, Regional Purchasing Committee.

Mr. W. S. Yeatts, Freight Assistant.

Mr. J. W. Lowery, Asst. Chief Clerk Auditor Frt. Trf. P. R. R.

Mr. Geo. C. Foedisch, Representative, Fuel Administration.

Item 9. Make your report promptly to the Regional Coal Committee, of the representative for your railroad giving both his office, residence telephone number and city exchange through which call should be made.

Item 11. For the present we will not require a report by grand divisions of information as to the coal situation but will ask that in making the report for you railroad you give the location, in a general way, of the coal. For illustration, we would like you to designate the yards, passing sidings or running tracks on which coal may be held.

[fol. 72] On Form A, referred to, for purpose of uniformity, in reporting first two items, A and B, include coal consigned to and for the use of the railroad making the report; Item C, all other coal on the railroad.

In making report show the grades of coal held (if possible show separately low sulphur gas coal), under the following classes: Gas coal, High Volatile, Steam coal, Low Volatile coal, By-Product Coal, separating where possible into run-of-mine, screened and slack.

Your attention is invited to the importance of following instructions in regard to giving this report by the hour named. We should have it in this office not later than 8:00 o'clock a. m.

Item 12. The explanation as to the first three groups applies as in Form A.

Item 13. Form C, is intended for use between the office of the Federal Manager and the Regional Coal Committee, having jurisdiction and will be forwarded for all requests that come to the Federal Manager for coal. Accompanying Form C is supplemental Form of Application and Release, Form CX, which should be used by the applicant when making his application to the Railroad representative, who, we assume, will be the Freight Agent having jurisdiction at the location of the applicant. This supplemental may be made in as many copies as desired and retained by the railroads for its file, and it should be understood that none of these supplemental [fol. 73] forms is to come to this office.

In order to make satisfactory report as called for in the last line of Form C, it is desired that the investigation of the conditions as to coal supply, daily consumption and total requirements of the applicant be personally investigated by a competent and responsible officer of the railroad.

Item 14. In order to avoid duplication of the consecutive numbers to be given each request by the Federal Managers, a letter prefix should be used as follows:

- R—Regional Coal Committee.
- L—Elisha Lee—Penna. Lines East.
- K—G. L. Peck—Penna. Lines West.
- G—C. W. Galloway—B. & O. Lines East.
- T—Ralph Peters—Long Island.
- D—A. M. Darlow—B. & S.
- B—R. N. Begien—B. & O. Lines West.
- E—C. H. Ewing—P. & R., C. R. R. N. J.
- U—E. H. Utley—B. & L. E.

Item 15. The instructions under 15 seem to be sufficiently explicit, but your attention is attracted to them with the request that you establish such safeguards as will insure payment for coal and the legal transportation charges,

Yours truly, (Signed) L. W. Baldwin, Regional Director.

[fol. 74] P. S.—Since dictating the above we have decided to change the make-up or Supplemental Form CX so as to embody the information desired in this office for which Form C was designed, so that the Federal Manager may use Form CX for the double purpose of securing information from the applicant and transmit same to this office all in writing. The Form to be printed on thin paper to secure as many duplicate copies as may be necessary, one legible duplicate copy with the necessary endorsements from the Federal Manager to be sent to this office in lieu of Form C. This will make unnecessary the printing of a separate Form C.

Copy**Telegram**

Washington, October 31, 1919.

L. W. Baldwin, Regional Director Allegheny Region, Philadelphia,
Pa.:

Instructions governing distribution of coal taken under order of
October thirty-first, nineteen nineteen.

1. Bituminous coal, including lignite, taken and held in accord-
[fol. 75] ance with the instructions of the Director General of Oc-
tober twenty-ninth and thirty-first, nineteen nineteen, or thereafter,
will be handled by the Director General and the Regional Director
through the agency of a Central Coal Committee at Washington and
Regional Coal Committees which will be established jointly by the
Regional Directors and the Fuel Administrations. Such regional
Coal Committees will comprise the following representatives: One
appointed by the United States Fuel Administrator and such others
as the Regional Director may select to handle in matters of purchase,
distribution and accounting.

2. The bituminous coal held must be distributed only to those
concerns who have no reserve supply and must have coal to meet
their emergency needs. The following order of preference shall
govern the Regional Coal Committee in such distribution as they may
make within their jurisdiction for emergency consumption in the
United States and Canada:

- (a) Railroads.
- (b) Army and Navy, together with other departments of the
Federal Government.
- (c) State and County Departments and Institutions.
- (d) Public Utilities.
- (e) Retail Dealers.
- (f) Manufacturing plants on War Industries.
Board's Preference List.

[fol. 76] (g) Manufacturing plants not on War Industries.

Board's Preference List.

- (h) Jobbers.
- (i) Lake.
- (j) Tidewater.

3. Note change in preference list as shown in wire order of Oc-
tober twenty-ninth, nineteen nineteen.

4. When commercial coal is diverted to other than original consignee, promptly notify shipper and original consignee of each car and keep adequate record for later settlement.
5. Originating coal roads should hold a considerable portion of the commercial coal near coal waybilling points, available for prompt distribution.
6. Intermediate and Terminal carriers should, as far as practicable, move commercial coal to, and hold it in the vicinity of, points most convenient for prompt rehandling and distribution.
7. Coal must not be delivered to commercial consumers either in accordance with priority list (established in Rule Two) or otherwise, except with specific authority from the Coal committee having jurisdiction.
8. Regional Directors will immediately notify each railroad under Federal control of the Regional Coal Committee with which it shall deal.
9. Each railroad shall report at once to the Central Coal Committee [fol. 77] and to the Regional Coal Committee the name, title, location and telephone address of the representatives in whom this whole matter will be centered for that railroad.
10. In order that the Central Coal Committee may be informed of the requirements for coal in each region and of the necessity for transferring coal from one region to another, each Regional Coal Committee will make such daily reports to the Central Coal Committee as are provided for herein and may be called for from time to time.
11. Each railroad (or each grand division of a railroad) shall report daily by wire to the Regional Coal Committee, to be received not later than nine a. m. information as to its coal situation for the twenty-four hours ending at one A. M., that day, in accordance with Form A attached herein.
12. Each Regional Coal Committee will report daily by wire to the Central Coal Committee, as promptly as information is available, a summary of the coal situation for the twenty-four hours ending at one a. m. that day in accordance with Form B attached herein.
13. Applications to Regional Coal Committees for delivery of coal to commercial consumers must be made through the Railroad which will make delivery of the coal; such applications must show complete and accurate information with respect to the preferred [fol. 78] nature of the requirements the amount of coal which the applicant has on hand, and the amount which the applicant requires for the preferred use, together with the rate of consumption and the kind and size of the coal desired, all as set forth in Form C attached hereto.

14. Each Regional Coal Committee will apply a consecutive number to all orders authorizing the delivery of coal and compliance with such orders must be reported promptly by the railroad to the Regional Coal Committee.

15. Coal diverted for commercial uses shall be paid for in accordance with the Fuel Administrators' order date- January 14, 1918. In order to insure payments coal shall be diverted for commercial use to such applicants only who shall satisfy the Federal or General Manager of their financial responsibility or who shall deposit a certified check or other satisfactory security in such sum that will insure full payment for any coal furnished. The applicant shall make definite written obligations to pay the shippers for the coal promptly upon presentation of bill. The legal transportation charges, including war taxes, from mines to point of delivery to the applicant, will be collected on delivery in the usual way.

Forms A, B and C mentioned herein attached. Acknowledge receipt by wire.

(S.) Walker D. Hines.

[fol. 79] United States Railroad Administration

Director General of Railroads

— Railroad

Daily Coal Situation Report to Regional Coal Committee, — — —,
1919

Code letter	Stock situation at 1 a. m.	Number of cars
A	Railroad coal in storage piles, bins, chutes and docks, estimated on basis of 50 tons per car.....	
B	Cars railroad coal at coaling stations and enroute.....	
C	Cars held commercial coal on hand.....	
D	Total coal available for use and distribution.....	
Consumption previous 24 hours ending 1 a. m.		
F	Cars coal used for railroad fuel.....	
G	Cars coal ordered to other railroads.....	
H	Cars coal ordered to Army, Navy and other Govern- ment Departments.....	
J	Cars coal ordered to State and County Departments and Institutions.....	
K	Cars coal ordered to Public Utilities.....	
M	Cars coal ordered to retail dealers.....	
N	Cars coal ordered to manufacturing plants on War Industries Board's preference list.....	
O	Cars coal ordered to manufacturing plants not on War Industries Board's preference list.....	
Q	Cars coal ordered to jobbers.....	
R	Cars coal ordered for lake shipment.....	
S	Cars coal ordered to tidewater.....	
U	Total cars coal disposed of F to S both inclusive.....	

[fol. 80] United States Railroad Administration

Director General of Railroads

Code letter	Regional Coal Committee, — Regions	Stock situation at 1 a. m.	Number of cars
A	Railroad coal in storage piles, bins, chutes and docks, estimated on basis of 50 tons per car.....		
B	Cars railroad coal at coaling stations and enroute.....		
C	Cars held commercial coal on hand.....		
D	Total coal available for use and distribution.....		
Consumption previous 24 hours ending 1 a. m.			
F	Cars coal used for railroad fuel.....		
G	Cars coal ordered to other regions.....		
H	Cars coal ordered to Army, Navy and other Govern- ment Departments.....		
J	Cars coal ordered to State and County Departments and Institutions.....		
K	Cars coal ordered to Public Utilities.....		
M	Cars coal ordered to retail dealers.....		
N	Cars coal ordered to manufacturing plants on War In- dustries Board's Preference List.....		
O	Cars coal ordered to manufacturing plants not on War Industries Board's Preference List.....		
Q	Cars coal ordered to Jobbers.....		
R	[fol. 81] Cars coal ordered for Lake Shipments.....		
S	Car coal ordered to Tidewater.....		
U	Total cars coal disposed of F to S both inclusive.....		

United States Railroad Administration

— Railroad

Railroad Consecutive No.—

—, 1919.

Regional Coal Committee at —:

Please authorize delivery of railroad fuel coal or held commercial coal as follows:

To — —, consignee.

At —, destination.

On —, delivery railroad.

No. of cars: —.

Size and grade of bituminous coal: —.

By date required: — —, —.

Preference list: —.

Description applicable: —.

Consignee's daily coal consumption; ——.

Tonnage of coal in consignee's possession; ——.

A written agreement to pay as required by Rule 16 has been secured and satisfactory financial arrangements assured.

[fol. 82] All the above information has been checked and is correct.
(Signed) —— ——, (Title:) ——.

United States Railroad Administration

Director General of Railroads

Application and Agreement for Bituminous Coal

Place, ——, Date, —— —, ——.

To the Director General of Railroads:

Attention of Freight Agent — Railroad, ——, Place

Please authorize delivery of railroad fuel coal or held commercial bituminous coal as follows:

To —— —, Consignee.

At ——, Destination, On ——, Delivering Railroad.

No. of cars: ——. Size & grade of coal: ——.

By date required: —— —, ——.

Preference list — description applicable.

Consignee's daily coal consumption: ——.

Tonnage of coal in consignee's possession: ——.

In consideration of the delivery to the undersigned of coal in cars requested above, the undersigned do hereby agree to pay, upon demand, for the said coal so delivered to the undersigned in accordance with the order of the U. S. Fuel Administrator as now in effect or hereafter lawfully modified, and the undersigned do further agree to pay to the Director General of Railroads the legally published transportation charges via the route of movement on said coal, including war taxes, from the point or points of origin of said coal to the point or points at which it is delivered to the undersigned, or at which it is delivered in accordance with instructions of the undersigned; and further the undersigned agree to fully indemnify and save harmless the Director General of Railroads and each carrier participating in the transportation of the property herein mentioned from and against any and all claims and demands whatsoever, actions, suits, costs, recoveries, judgments, or executions which may be made, brought, recovered, or levied against the aforesaid Director General of Railroads or against any of the carriers participating, as aforesaid, by reason of the delivery, diversion, reconsignment or reshipment of the property herein as aforesaid to the undersigned or in accordance with the instructions of the undersigned.

(Signature of applicant:) —— —.

— — —, Witness.

Recommendation of Freight Agent

Consecutive No. —

To Regional Coal Committee at — R. R.:

As above in full or to the extent of — per cent.
Please authorize delivery.

[fol. 84]

Phila. Oct. 29, 1919.

C. W. Galloway, Balto.; F. C. Batchelder, Chgo.; R. N. Begien, Cinti.:

Effective at once please provide sufficient bituminous coal for 30 days normal consumption on each railroad under your jurisdiction, purchasing the required coal if possible at fair prices, but if this can not be done, holding coal in transit up to but not in excess of the quantity necessary to assure 30 days normal supply on each railroad.

Please make a survey of the supply situation on each railroad under your jurisdiction to determine exact conditions and in selecting coal to be held except on the following order of priority shipments which need not be held to insure a 30 days normal supply.

- A. Steam railroads inland and coastwise vessels.
- B. Domestic including hotels, hospitals and asylums.
- C. Navy and Army.
- D. Public utilities, including plants and such portion of plants as supply light, heat and water for public use.
- E. Producers and manufacturers of food, including refrigeration.
- F. National state county and municipal government emergency requirements.
- G. Bunkers and other marine emergency requirements not specified above.

[fol. 85] H. Producers of newsprint papers and plants necessary to the printing and publication of daily newspapers.

Coal in transit should not be unloaded in storage nor used until actually needed, so that if its use is later found unnecessary it can be forwarded to destination whenever practicable. Failure to obtain sufficient coal for 30 days normal supply by purchase and holding as above please advise the additional quantity needed for 30 days.

Acknowledge receipt by wire.

2.30 a. m.

L. W. Baldwin.

PLAINTIFF'S EXHIBIT 13

United States Railroad Administration

Philadelphia, Pa., November 2, 1919.

Mr. Elisha Lee, Mr. G. W. Galloway, Mr. C. H. Ewing, Mr. G. L. Peck, Mr. R. W. Begien, Federal Managers.

[fol. 86] GENTLEMEN: The question has come up as to the activities of various Committees at such places as Philadelphia, Pittsburgh, Cincinnati, Cleveland, etc., and in order to have uniformity the following instructions shall govern until further advised.

In a general way the Committees should be utilized by the Federal Managers as agencies for the investigation of requirements for coal, and their recommendations to you for the fulfillment of such requirements, and the Committees in exercising their activities to aim to co-ordinate the operations at terminal served by more than one railroad, in order that there should be complete harmony of action in supplying various industries under priority list. Likewise at the Tidewater terminals, the Tidewater Coal Exchange representative should be utilized in the same manner for all trans-shipment of coal. The activities of the Committees and the Tidewater Coal Exchange Representatives at Philadelphia and Baltimore will be sub-divided so that the Tidewater Coal Exchange should handle coal trans-shipment matters while the Committees will handle questions pertaining to all-rail deliveries. At Tidewater points where no such complexities exist as at Baltimore and Philadelphia, for illustration South Amboy and Port Reading, the Federal Manager [fol. 87] should utilize the agencies of the Tidewater Coal Exchanges for handling trans-shipment matters.

The jurisdiction of the Philadelphia Committee will be confined to the corporate limits of the City; Baltimore and Pittsburgh the same. The Youngstown Sub-Committee which now acts through the Pittsburgh Operating Committee, should be utilized in this matter of coal distribution as a Sub-Committee of the Pittsburgh Committee, confining its activities to the City of Youngstown. Cincinnati, will come within the jurisdiction of Mr. Worcester, District Director; Chicago under Mr. Aishton, Regional Director; St. Louis under Mr. Bush, Regional Director. New York City and Harbor under Mr. Hardin, Regional Director. Places like Columbus, Cleveland, and Indianapolis it is not thought necessary to establish jurisdiction of a Committee, but Federal Managers should make use of Committees already existing for such investigations and recommendations as they may desire.

Buffalo comes within the jurisdiction of the Eastern Region.

Yours truly, (Signed) L. W. Baldwin, Regional Director.

Copy Mr. E. J. Cleave, Reading Terminal-Philadelphia.

[fol. 88] Please note. Committee of which you are Chairman is the one referred to in this correspondence. Please be prepared to respond to requests made upon you by Federal Managers of railroads entering Philadelphia and make every effort to co-ordinate operations in Philadelphia, so as to secure uniformity of action which is necessary.

Mr. J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Bldg., New York.

Mr. J. W. Searles, Dept. Com., Tidewater Coal Exchange, Singer Bldg., New York.

Mr. George Patchell, Dept. Co., Tidewater Coal Exchange, Commercial Trust Bldg., Philadelphia.

Mr. G. F. Malone, Dept. Com., Tidewater Coal Exchange, Munsey Building, Baltimore, Md.

Mr. J. J. Mantell, Terminal Manager, Jersey City, N. J.

Mr. O. H. Hobbs, Chairman Baltimore Committee, Baltimore.

Mr. E. A. Peck, Chairman Pittsburgh Committee, Pittsburgh.

[fol. 89]

PLAINTIFF'S EXHIBIT 14

(Copy)

United States Fuel Administration

Washington, D. C., Nov. 6, 1917.

Order relative to tidewater transhipment of coal at Hampton Roads, Baltimore, Philadelphia, and New York and for the employment of and co-operation with the Tidewater Coal Exchange, so-called, as a common agency to facilitate such transhipment and to reduce delays in the use of coal cars and coal-carrying vessels.

It appearing to the United States Fuel Administrator that the production of coal intended for transhipment at the Tidewater ports of Hampton Roads, Baltimore, Philadelphia and New York, and ports near or usually considered as tributary to said ports is being restricted, and that the loading of coal-carrying vessels and the unloading of coal cars at such ports and the movement, arrival and return of such vessels and cars at and from such ports are congested and delayed, and that the shipment of coal from such ports is reduced in quantity, and that the distribution of coal to consumers in the territory tributary to the ports to which such coal is destined is less efficient, prompt and reasonable than is necessary for the efficient prosecution of the war, and that delay is occasioned in the delivery of coal for vessels of the navy and transports of the army, by reason of the continuance of individual shipments of coal by various producers upon the lines [fol. 90] of coal-carrying roads having terminals at the ports aforesaid, and of individual and distinct transhipments of such coal at

such ports only to coal-carrying vessels especially chartered or designated for the transhipment thereat of such individual shipments, and that the objectionable conditions aforesaid can be largely eliminated and the production, shipment, and distribution of coal from said ports both for the army and navy and for consumers in the territories aforesaid can be hastened and improved by the employment of and co-operation with a common agency at each transhipment port in the manner and with the powers hereinafter provided, and that such employment of and co-operation with a common agency is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, and to assure an adequate supply and equitable distribution, and to facilitate the movement, and to prevent locally or generally scarcity, of coal.

The United States Fuel Administrator, acting under the authority of an Executive Order of the President of the United States, dated August 23, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that, until further or other order of the United States Fuel Administrator and subject to modification hereafter by him at any time and from time to time, the following rules are established for the regulation, to the extent hereinafter pro-
[fol. 91] vided, of the method of production, sale, shipment, distribution, apportionment, and storage of bituminous coal for transhipment at the ports aforesaid:

(1) Every shipper of bituminous coal for transhipment at any one of the ports at Hampton Roads, Baltimore, Philadelphia, and New York, and ports near or usually considered as tributary to said ports, shall on and after November 11, 1917, consign all such shipments of coal to the Tidewater Coal Exchange, so-called, of which Rembrandt Peale is the commissioner. Such shipments and consignments shall be made by each such shipper in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the transhipment and delivery of the coal included therein, as under the terms of said rules apply to members of said Tidewater Coal Exchange, but no such shipper subject to this order shall be required by reason of anything herein to become a member of said Tidewater Coal Exchange. A copy of said rules is annexed to this order and hereby referred to. Wherever said rules refer, or mention a "member" or "members" of said Tidewater Coal Exchange, said terms shall with respect to this order and shippers subject hereto be deemed to mean a shipper or shippers of coal who are subject to this order; and wherever the "effective date" of the Exchange or of said rules is referred to therein, such reference shall be deemed, with respect [fol. 92] hereto and to the shippers subject hereto, to refer to the effective date of this order.

(2) Bituminous coal consigned under the provisions of this order shall be graded and classified in accordance with "Exhibit B Consigning Pool Numbers," referred to in said rules of the Tidewater Coal Exchange, as modified, cancelled or superseded by the provisions of Classification C, dated July 15, 1917; Classification D, dated July 17, 1917; Classification E, dated July 19, 1917 and Classification F, dated July 27, 1917, and in accordance with the provisions of said Classifications C to F inclusive, wherever applicable, copies of which and of said "Exhibit B" are on file with this order in the office of the United States Fuel Administrator for inspection by any shipper subject hereto. Changes in said Classification shall not be made against the objection of any shipper subject hereto, except after approval of such changes by the United States Fuel Administrator. Upon application from any shipper subject hereto, the representative of the United States Fuel Administrator appointed under the provision of paragraph (3) of this order is directed to furnish copies of said "Exhibit B," and said Classifications C to F to such shipper.

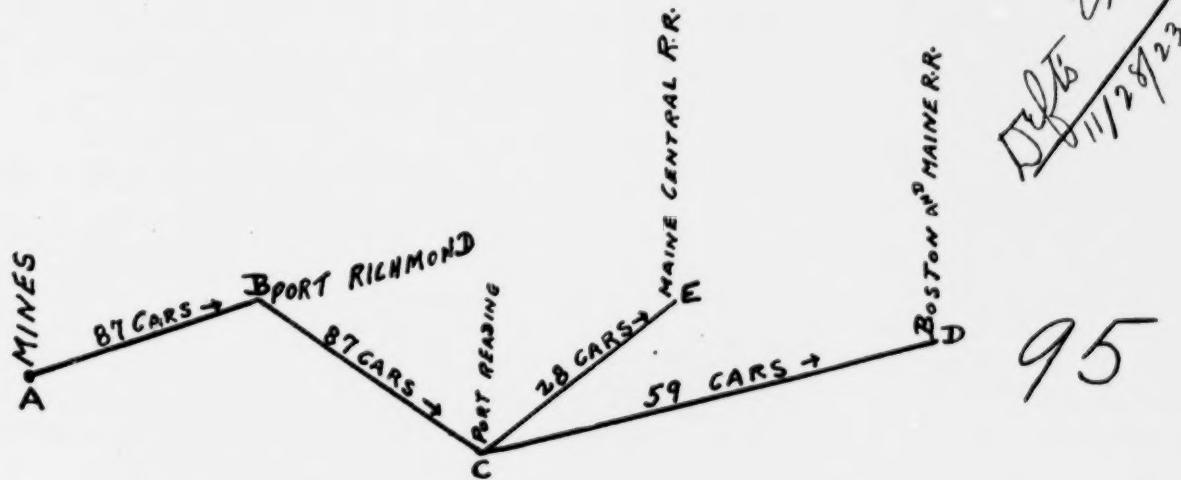
(3) Said Rembrandt Peale, commissioner of said Tidewater Exchange, is hereby designated and appointed as the representative of the Fuel Administrator to carry out the provisions of this order, with [fol. 93] power to appoint deputies representing him as such representative of the United States Fuel Administrator at any one or all of the ports aforesaid; and in case of any disagreement or controversy between any shipper subject to the provisions hereof and said commissioner with respect to any shipment or trans-shipment of coal or other matter arising under this order, or if any decision under rule No. 15 of the said Tidewater Coal Exchange Rules hereto annexed, which would be final as to any member of said Exchange, is unsatisfactory to any shipper subject to the provisions hereof, such shipper may appeal to the United States Fuel Administrator.

(4) No change shall be made in said rules to the Tidewater Coal Exchange above referred to, a copy of which is annexed to this order, and no additional rules shall be adopted affecting shippers subject to this order, without first receiving the approval of the United States Fuel Administrator.

(5) No change shall be made in the membership of the Executive Committee of said Tidewater Exchange, except with the approval of the United States Fuel Administrator so long as this order is in effect.

(6) Any shipper subject to the provisions of this order may at any time apply to the United States Fuel Administrator for suspension or termination of this order upon the ground that its continuance is no longer essential to the national security and defense and for the successful prosecution of the war in which the United States is at present engaged.

ARCHIBALD MCNEIL AND SONS CO. INC. VS. U.S.A.



EIGHTY SEVEN CARS OF COAL SHIPPED FROM MINES (A) BY JAMISON COAL AND COKE CO. TO THEIR ACCOUNT IN TIDEWATER COAL EXCHANGE AT (B) PORT RICHMOND (PHILADELPHIA). ON ARRIVAL AT (B) ON ACCOUNT OF CONGESTION, THE COAL WAS RECONSIGNIED BY BITUMINOUS COAL DISTRIBUTION COMMITTEE, AT THE REQUEST OF TIDEWATER COAL EXCHANGE, TO SAME CONSIGNEE AT (C) PORT READING, N.J. SUBSEQUENT TO ARRIVAL AT (C) THE COAL WAS DUMPED BY PORT READING RAILROAD, FOR ACCOUNT OF F.R. LONG & CO., BY ORDERS OF THE TIDEWATER COAL EXCHANGE, AND UPON AUTHORITY GRANTED BY W.T. LAMOURE, CHAIRMAN, NEW ENGLAND DISTRICT COAL COMMITTEE, THE EXCHANGE ORDERED THE COAL DUMPED FOR LONG'S ACCOUNT INTO VESSELS CONSIGNIED TO (D) BOSTON AND MAINE RAILROAD, 59 CARS, AND TO (E) MAINE CENTRAL RAILROAD, 28 CARS.

[fol. 94] (7) A copy hereof shall be served upon each of the railroad or railway companies and upon each of the producers of bituminous coal named in the list marked "Exhibit 1 to the Tidewater Coal Exchange Transhipment Order of The United States Fuel Administrator, dated November 6th, 1917."

H. A. Garfield, United States Fuel Administrator.

(Here follows Defendant's Exhibit No. 1, marked side folio page 95)

[fol. 96]

DEFENDANT'S EXHIBIT 1-A

(Copy)

United States Railroad Administration

Director General of Railroads

Application and Agreement for the Delivery of Bituminous Coal

Place, Boston, Date, Dec. 16, 1919.

To the Director General of Railroads:

Attention of Freight Agent P. & R. Railroad, Port Reading Place

Please authorize delivery of bituminous coal as follows:

To Boston & Maine Railroad, —, applicant.

At Boston, destination, on B. & M., delivering railroad.

No. of cars: —. Size and grade of coal: 1,820 tons R-M in barge Forest Belle.

By date required: 12-16-19.

Preference list description applicable: A.

Applicant's daily coal consumption: Approx. 5,000 tons. Tonnage of coal in Applicant's possession: 140,000 tons.

In consideration of the delivery to the undersigned of coal in cars requested above the undersigned do hereby agree to pay, upon demand, for the said coal so delivered to the undersigned in accordance with the order of the U. S. Fuel Administrator as now in [fol. 97] effect, or hereafter lawfully modified, and the undersigned do further agree to pay to the Director General of Railroads the legally published transportation charges via the route of movement of said coal, including war taxes, from the point or points of origin of said coal to the point or points at which it is delivered to the undersigned, or at which it is delivered in accordance with instructions of the undersigned; and further the undersigned agree to fully indemnify and save harmless the Director General of Railroads and each carrier participating in the transportation of the property herein mentioned from and against any and all claims and demands

whatsoever, actions, suits, costs, recoveries, judgments, or executions which may be made, brought, recovered, or levied against the aforesaid Director General of Railroads or against any of the carriers participating, as aforesaid, by reason of the delivery, diversion, reconsignment or reshipment of the property herein as aforesaid to the undersigned or in accordance with the instructions of the undersigned.

(Signature of applicant:) J. R. Rooks, Fuel Agent.

S. J. Trudian, Witness.

Approved: J. W. Howe, Commissioner.

[fol. 98]

D'F'T'S EXHIBIT 1-B

United States Railroad Administration

Philadelphia and Reading Railroad, Atlantic City Railroad, Port Reading R. R.

Telegram—Phila., November 10, 1919. Mailgram

O. H. Hagerman, Port Richmond:

Confirming 'phone order. Reconsign two hundred (200) cars pools 33 and 34 bituminous coal Port Richmond Piers to same consignment Port Reading Piers. Also fifty (50) cars pool 37 bituminous coal to same consignment Port Reading, N. J. with all charges following, and issue letter of transfer.

O. W. Stager.

Form C. K. R. E. E. #3.

Mr. P. J. Kelly, Bldg., c-o Mr. Foote.

Mr. E. B. Crosley, Bldg., on request of Tidewater Coal Exchange, Phila.

D'F'T'S EXHIBIT 1-C

Western Union Telegram

[fol. 99] HM. Boston, Mass., 1249 P.

1919, No. 26, P. M. 12.59.

J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Building, New York, N. Y.:

Our wire twenty fifty substitute barge Pohateong for Hopateong no other change.

W. T. Lamoure.

Boston and Maine.

OK. J. W. Howe.

em 11-28.

Order #746. 11-26.

D'FT'S EXHIBIT 1-D

Western Union Telegram

HM. Boston 505 P. 25.

1919, Nov. 25, P. M. 5.17.

J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Bldg.,
New York, N. Y.:Recommend permit barges Hopatcong and Strafford 1,100 each
load by F. R. Long Company Port Reading consigned Boston and
Maine Railroad Boston Mass. Classification "A" no CX, forms here.

W. T. Lamoure.

OK. J. W. Howe.

em 11-26.

Order #747 11-26.

D'FT'S EXHIBIT 1-E

Western Union Telegram

[fol. 100] HM. Boston, Mass., 545 P. 14 (1681).

1919, Nov. 14, P. M. 6.05.

E. 449B. CAK.

J. W. Howe, Commissioner, Tidewater Coal Exchange, Singer Bldg.,
New York, N. Y.:Recommend permits barges Upton Shamokin and Oxford Hopat-
cong both eleven hundred tons loading Port Reading by F. R. Long
& Company consigned Maine Central Railroad Portland, Maine.

W. T. Lamoure.

Order No. 966. Order #967.
em 11-28.

D'FT'S EXHIBIT 1-F

Western Union Telegram

B385B. CAK.
Boston, Mass., 14.

1919, Nov. 14, P. M. 5.12.

J. W. Howe, Commissioner, Tidewater Coal Exge., Singer Building,
New York, N. Y.:Recommend permits barges Camden and Hatteras 1,100 tons each
load Port Reading by F. R. Long and Co. consigned Boston and
Maine Railroad Boston Massachusetts barges left Boston today.

W. T. Lamoure.

#968. Order #962.

[fol. 101]

D'F'T'S EXHIBIT 1-G

Telegram

The Pennsylvania Railroad Company

New York, Philadelphia & Norfolk Railroad Company, West Jersey & Seashore Railroad Company

17-18 PC. H. E.

Phila., Dec. 12, 1919.

J. W. Howe, New York:

Regional Coal Committee advises as follows: "Central Coal Committee Washington authorizes loading two barges Port Reading, Eastern Region railroads outside of New England. Arrange according and advise CX form forwarded in customary manner referring file C-C-6-1024." Arrange to have forwarded promptly file X-1.

C. W. Stager.

5.56. p.

Shenango, Maine Central, Forest Belle, Boston & Maine, B. & Me., Central.

These CX should be sent direct to W. T. L.

D'F'T'S EXHIBIT 1-H

Form C

United States Railroad Administration

Director General of Railroads

Regional Committee

Philadelphia, Pa., Nov. 8, 1919.

Mr. Charles H. Ewing, Federal Manager Phila. & Reading R. R., Philadelphia, Pa.:

[fol. 102] Consecutive No. R. 617

Please deliver railroad fuel coal or held commercial coal as follows:

To B. and M. and Maine Central Railroad barges.

Request Shickshinny and Ample.

At (point of interchange) Port Reading.

No. of cars: Sufficient to meet requirements.

Size and grade of bituminous coal: Shipped from Harrison, W. Va.

By date required: _____

Remarks.—Also release sufficient coal at Port Liberty to bunker tug boats moving above barges.

(Signed) L. W. Baldwin, Regional Director. cm.

DFT'S EXHIBIT 1-I**Executive Order**

Whereas the United States Fuel Administrator acting under the authority of an Executive Order issued by me dated the 23rd of August, 1917, appointing the said Fuel Administrator and of subsequent Executive Orders, and in furtherance of the purpose of said orders and of the Act of Congress, therein referred to and approved August 10, 1917, did, on January 31, 1919, and on February 20, 1919, execute and issue orders suspending, until further order by the President certain rules, regulations, orders and proclamations theretofore promulgated relating to the fixing of prices, the production, sale, shipment, distribution, apportionment, storage and use of coal, [fol. 103] and whereas it is necessary to restore *the* maintain during the war certain of said rules, regulations, orders and proclamations:

Now, Therefore, I, Woodrow Wilson, President of the United States of America, acting under authority of the aforesaid Act of Congress, approved August 10, 1917, do hereby revoke and annul said orders of January 31, 1919, and February 20, 1919, to the extent necessary to restore all of the said rules, regulations, orders and proclamations therein suspended concerning:

- (a) Fixing prices of bituminous and lignite coal at the mines;
- (b) Fixing or regulating commissions of persons and agencies performing the functions of middlemen dealing in bituminous and lignite coal;
- (c) Fixing or regulating gross margins or prices of wholesale and retail dealers in bituminous and lignite coal;

and do hereby restore all of said rules, regulations and proclamations, to the extent herein provided, to full force and effect, as if they had not been suspended.

Inasmuch as it is contemplated that it may be necessary from time to time to revoke other portions of said orders of January 31, 1919, and February 20, 1919, and to restore to full force and effect rules, regulations, orders and proclamations, or portions thereof, regulating the production, sale, shipment, distribution, apportionment, storage or use of bituminous and lignite coal, the Fuel Administrator shall, [fol. 104] as occasion arises, restore, change or make such rules or regulations relating to the production, sale, shipment, distribution, apportionment, storage or use of bituminous and lignite coal as in his judgment may be necessary.

Woodrow Wilson.

The White House, October 30, 1919.

D'F'T'S EXHIBIT 1-J

Washington, D. C., October 31, 1919.

Acting under authority conferred upon me by the President of the United States under and by virtue of authority conferred upon him by the Act of Congress approved August 10th, 1917, I hereby revoke the order of the United States Fuel Administrator issued January 31, 1919, in so far as it suspended the order of the United States Fuel Administrator of January 14th, 1918, effective seven o'clock a. m., January 15, 1918, and the portion of the order of the United States Fuel Administrator of May 25, 1918, setting up Preference lists, and I hereby restore the said order of January 14, 1918, and said portion of the order of May 25, 1918, to like effect as if they had not been suspended; and I designate the Director General of Railroads and his representatives to carry into effect the said order of January 14, 1918, and to make such diversions of coal which the railroads under his direction may as common carriers have in their possession, as may be necessary in the present emergency to provide for the requirements of the country in the order of priority set out in the preference list included in the order of the United States Fuel [fol. 105] Administrator of May 25, 1918, as follows:

- (a) Railroads.
- (b) Army and Navy, together with other Departments of the Federal Government.
- (c) State and County Departments and Institutions.
- (d) Public Utilities.
- (e) Retail Dealers.
- (f) Manufacturing Plants on War Industries Board's Preference List.
- (g) Manufacturing Plants not on War Industries Board's Preference List.
- (h) Jobbers.
- (i) Lake.
- (j) Tidewater.

This order to be effective at once.

H. A. Garfield, United States Fuel Administrator.

D'F'T'S EXHIBIT 1-K

Order of January 14, 1918

Washington, D. C.

All shipments of coal, whether f. o. b. mines or otherwise, and all shipments of coke f. o. b. ovens or at place of storage or otherwise

shall be made subject to the diversion of such coal or coke by the United States Fuel Administrator or any persons acting under his authority, to any persons or consumers, and for any of the pur-[fol. 106] poses heretofore or hereafter authorized by him. The title of the purchaser, consignee, or consumer, in the case of any such shipments of coal or coke, which by custom or law might become vested at the time and place of such shipment, shall from and after the effective date hereof be subject to the condition that the coal or coke so shipped may be diverted as aforesaid, and that in case of any such diversion the title and interest of such purchaser, consignee, or consumer with respect to any coal or coke so diverted shall be completely divested and terminated and his liability to pay therefor shall cease. The person or consumer to whom any such coal or coke is diverted shall become liable as of the time of such diversion to pay to the shipper thereof the price in force at the date of shipment as fixed therefor by or under authority of the President of the United States, plus transportation charges thereon and plus a handling charge of 15 cents a net ton to cover costs of rebilling, collection, and replacement. If such handling charge is made, no jobber's commission shall be added to the mine's price. If the coal or coke so diverted was shipped under a valid and enforceable contract, the quantity thereof so diverted shall not be charged against the amount to which the contract applied.

H. A. Garfield, United States Fuel Administrator.

Effective at 7 a. m., on January 15, 1918.

[fol. 107]

D'F'T'S EXHIBIT 1-L

Order of the United States Fuel Administrator of Nov. 20, 1918, effective Nov. 21, 1918, vacating the order of Jan. 14, 1918, relative to the basis of settlement for diverted coal so far as said order authorizes a rehandling charge of fifteen cents per ton.

Washington, D. C., Nov. 20, 1918.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said orders and of the act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that the order of said Administrator dated January 14, 1918, entitled "Regulation established by the President of the United States, acting through the undersigned Fuel Administrator relative to the sale, shipment, distribution, and apportionment of coal and coke among dealers and consumers and the price to be paid therefor in case of diversion," be, and the same hereby is, vacated and set aside as of the effective date of this order,

so far as said order authorizes a handling charge of 15 cents per ton, to cover costs of rebilling, collection, and replacement, to be added to the price of coal or coke diverted by the United States Fuel Administrator, or by any person acting under his authority. Except as hereinabove provided said order shall remain in full force and effect.

[fol. 108] This order to be effective November 21, 1918.

H. A. Garfield, United States Fuel Administrator.

D'F'T'S EX. 1-M

Washington, D. C., November 12, 1919.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, Dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said Order and of the Act of Congress therein referred to and approved August 10, 1917.

Hereby orders and directs that the Executive Order dated October 30, 1919, restoring certain rules, regulations, orders and proclamations relative to prices of bituminous coal and lignite, and the margins and profits of middle men and wholesale and retail dealers in bituminous coal and lignite, shall not be applicable to bituminous coal shipped on or after November 13, 1919, under a bona fide contract enforceable at law, entered into prior to October 30, 1919, and coal shipped under any such contract and diverted in transit, shall be paid for by the party receiving the same, at the price at which the shipper would be entitled to bill the same to the original consignee thereof.

The regulation of said Administrator dated January 17, 1919, entitled "Regulation relative to the Making of Contracts for the Sale of Coal or Coke by Operators, Jobbers, Sales Agents or Purchasing Agents of Coal or Coke," and the order of said Administrator dated January 14, 1918, relative to the price to be paid for coal by the diverteer in case of diversion, as amended by the order of said Administrator dated November 20, 1918, and each of them is, hereby suspended in so far as said regulation and order, or either of them, are inconsistent with this order.

H. A. Garfield, United States Fuel Administrator, by Cyrus Garesey, Jr., Assistant United States Fuel Administrator.

DFT'S EXHIBIT 1-N

Amended Order of the United States Fuel Administrator of Feb. 25, 1918, Fixing Prices for Export and Bunker Coal Issued in Publication No. 15 (Revised) of the United States Fuel Administration.

Washington, D. C., February 25, 1918.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States dated 23 August, 1917, appointing said administrator, and in furtherance of the purpose of said order and of the act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that the order of the United States Fuel Administrator dated December 13, 1917, and entitled "Relative to prices for coal for foreign bunkering purposes and export [fol. 110] cargoes," is hereby amended to read as follows:

1. Until further or other order of the United States Fuel Administrator, the maximum price of coal sold and delivered for export to foreign countries, excepting Canada and Mexico, or to vessels for foreign bunkering purposes, shall be the price prescribed for such coal at the mine at the time such coal left the mine, plus transportation charges from the mine to port of loading, plus \$1.35 per ton of 2,000 pounds. To this price, computed as above, the seller of the coal, or such other agency as performs the actual work of bunkering or loading the vessel, may add the customary and proper charges, if any, for storage, towing, elevation, trimming, special unloading, and other port charges, and is subject to all present and future regulations of the United States Government.
2. No coal can be invoiced at the excess price provided in this order except by the operator or dealer who actually loads it into foreign vessels and only after the coal has been so loaded.
3. After, and only after, such excess price has been collected in accordance with paragraph 2, all or such part of it as has been agreed upon beforehand may be paid to the dealer or dealers from or through whom the coal was obtained.
4. In settling the price of coal for foreign bunkering or export purposes, no jobber's margin or other commission in addition to the \$1.35 per ton provided in the order shall be added to the price of the coal.
- [fol. 111] 5. The phrase "delivered—to vessels for foreign bunkering purposes" mentioned above, is hereby held to mean coal put in the bunkers of any vessel sailing from a tidewater port for any port outside the United States and Alaska, excepting naval vessels or Army transports.
6. Coal shipped to possessions or dependencies of the United States, when consigned to any department of the United States Government, shall not take the excess price provided by this order.

H. A. Garfield, United States Fuel Administrator.

[fol. 112]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Sur Trial Hearing Before the Court Without a Jury—Filed
Jan. 14, 1924

OPINION

DICKINSON, J.:

There are no evidentiary fact findings to be made, all the facts having been stipulated, or if not, being not now in controversy.

There are but two questions of law presented, and as one has already been ruled, there is but one remaining question. This question is whether there was a taking of the property of the plaintiff by the United States within the meaning of the Constitutional provision that there shall no "private property be taken for public use without just compensation."

In order that the real question may be fairly faced several general observations may well be made. One is that independently of the Constitutional provision private property might be taken for public use without compensation through the exercise of the power of eminent domain. Another is that had the coal which figures in this case been taken for the direct use of any Department of the [fol. 113] Government of the United States the right of plaintiff to judgment would be admitted. Still another is that as a war measure the United States, through its Director General of Railroads, took over the administration of railroads, and through its Fuel Administrator the direction and control of the coal supply of the Country. And still another is that at the time to which the statement of claim in this case refers the Fuel Administrator was without the personnel of an organization, and for the purposes of this and other like cases was loaned the organization of the Director of Railroads for fuel administration service.

The formulation of any statement or indeed any list even of all the provisions of the law and of the regulations in chronological or logical sequence which would be full and adequate would call for an expenditure of labor and space which is denied to the limits of an opinion.

The industry and disposition of counsel to meet the questions presented in this cause fairly and squarely has relieved us of this duty. We see no need for the Court to do more than rule upon the broad questions of law presented because when these are ruled the judgment which results is a logical consequence over which counsel will not differ. We accordingly content ourselves with a statement of the broad findings made, with leave to the parties to submit requests for other or more specific findings, if either wishes to do so, the answers to which will be incorporated with this opinion. These findings are of a mixed nature and will be designated simply as findings without any attempt to distinguish between findings of fact and conclusions of law.

[fol. 114]

Discussion

We have what has been aptly characterized as a fighting Constitution. This means that the war power is the dominant one of those conferred and when in exercise commands the yielding to it of all others. This is not because of any scheme of distribution of powers or because of the will or censem in any real sense of any one but because of the law of necessity. This further, however, does not mean that other provisions of the Constitution are ignored, nullified or suspended by the calling of the war power into exercise. It simply means that the war power must be left untrammeled. The war power of a nation is nothing more than the forces possessed by its people organized for public defense. Among these possessions are the manhood of the nation and the property of its people. Wealth or property has power, as in a like sense, knowledge is power. The Government may take for public purposes both the manhood and the wealth of the nation. When the man power is appropriated, there is no compensation allowed for the sacrifice made than such as a gratified nation may award. This may take the form of bounty, pay, pension or bonus, as Congress may will. There is no thought in any of these gratuities of what we call a legal right. When, however, property is taken the owner has a legal right to "just compensation". There can of course be no lawful taking except for a public use, but aside from this the legal right to compensation arises not out of the mode nor the manner of the taking nor the purpose for which taken but out of the taking. In other words, the "compensation" to which the owner has this legal right becomes due to him because he has lost his property by reason of its appropriation to a public use. This is the basis of the plaintiff's claim.

[fol. 115] The position of the defence is, as we understand it, that had this coal been taken or "requisitioned" (as the phrase is) and been devoted to the use of the army or navy, the right of the plaintiff to compensation would not be disputed, but inasmuch as it was taken by subordinates of the Director of Railroads, acting at the time as subordinates of the Fuel Administrator and by authority of his order for the use of a concern known as Long & Company for the purpose of being sold by them to a railroad company to be used for railroad purposes, the coal, although thus taken, was not "taken" but was merely "diverted". There would be small comfort to the owner of property, whose property had been taken from him and he thus deprived of it, to receive the assurance that it had not been "taken" but "diverted". Any such owner would be slow to understand why he lost his right to compensation for property which had been taken from him because the one who had taken it changed his name from "taker" to "diverter". A well known educator and writer has expressed the lesson of his experience, diplomatic and otherwise, that "words are slippery and thought are viscous". The word "taken" in Constitutional use has, in the revision of State Constitutions, been amplified into the phrase "taken, injured or destroyed". The immediate occasion for such change in the Constitution of Pennsylvania was that the Courts of that State had held that

an owner of property, whose property had not in fact been taken, could not recover compensation because it had been subjected to a consequential injury through a public improvement. Here there is a difference not merely in verbiage but in our concept of what the words bring before our minds. Property may be taken without being injured or it may be injured without being taken, but it is impossible to get a concept of this property being diverted in the sense [fol. 116] in which the word is here used unless it had been first taken. A thought which can readily be grasped and which is doubtless the true one, is that the word "diversion" relates not to the act of taking but to the purpose for which taken.

The question before us then becomes this that if the United States takes private property for the ultimate purpose of some one else, has the owner the right to compensation? The property cannot be lawfully taken except for a public use, and we are unable to see that the owner has any concern in what that use is.

The position of the defendant really is one not of denial of the plaintiff's claim but of the remedy which is being pursued. Whatever the legal right the sovereign cannot be sued except as it consents. Upon this phase of the case we have already passed, and plaintiff has the right of adherence to this ruling. Either party has leave to move for judgment in accordance with this opinion and the stipulation into which the parties have entered, and jurisdiction is retained for this purpose, and likewise for the purpose of incorporating herewith the answers to any requests for findings of fact or conclusions of law which may be presented.

[fol. 117] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

And now, this 25th day of February, 1924, on motion of Charles H. Burr, Esq., attorney for plaintiff, the Court enters judgment for plaintiff under the findings of fact and law heretofore filed herein in the sum of \$17,041.75, together with interest thereon amounting to the sum of \$4,330.36; that is to say, a judgment in the total sum of \$21,372.11 with costs.

By the Court.

(Sgd.) Dickinson, District Judge.

[fol. 118] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed May 7,
1924

And now comes the United States of America, defendant herein, by George W. Coles, United States Attorney, and says:

That on the 25th day of February, 1924, the District Court entered a judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

Wherefore this defendant prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

George W. Coles, United States Attorney, for Defendant.

[fol. 119]

[Title omitted]

And now, this 7th day of May 1924, comes the defendant by its attorney and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof of the court does allow the writ of error prayed for.

By the Court.

Dickinson, U. S. District Judge.

[fol. 120]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 7, 1924

The defendant in this action in connection with its petition for writ of error makes the following assignment of errors, which it avers exist:

First. The Court erred in denying defendant's motion to dismiss for want of jurisdiction;

Second. The Court erred in conceiving that the plaintiff had a cause of action against the defendant under the Fifth Amendment to the Constitution of the United States, and under Section 10 of the Act of Congress approved April 10, 1917, 40 Stat. 276, commonly known as the Lever Act.

Third. The Court erred in entering judgment in favor of the plaintiff and against the defendant.

Wherefore the plaintiff prays that the judgment of the said District Court be reversed.

George W. Coles, United States Attorney, for Defendant.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGES'S CERTIFICATE—Filed May 7, 1924

In this cause I hereby certify that the order denying the motion to dismiss herein was based on ground that this Court had jurisdiction of the parties in the cause of action herein; and that the judgment was entered in this case in favor of the plaintiff and against the defendant on the ground that the plaintiff had a right of action against the defendant within the meaning of the Fifth Amendment to the Constitution of the United States that there shall no "private property be taken for public use without just compensation."

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

This 7th day of May, 1924.

O. B. Dickinson, District Judge.

[fol. 122] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECEIPE FOR TRANSCRIPT OF RECORD—Filed May 26, 1924

To the Clerk U. S. District Court, Eastern District of Pennsylvania:

In preparing the record in the above case, please include the following:

1. Docket Entries,
2. Writ of Error,
3. Plaintiff's Statement of Claim,
4. Special Appearance for Defendant,
5. Motion to Dismiss,
6. Opinion, Dickinson, Judge, Sur Motion to Dismiss,

7. Defendant's Exception to Refusal of Motion to Dismiss,
8. Affidavit of Defense Regarding Questions of Law,
9. Supplemental Affidavit of Defense Raising Questions of Law,
10. Opinion Dickinson Judge, Sur Affidavit of Defense Raising Questions of Law,
11. Affidavit of Defense,
12. Stipulation Waiving Jury Trial,
13. Testimony,
14. Opinion Dickinson Judge Sur Trial Hearing before the Court without a jury,
15. Judgment for Plaintiff,
16. Petition for Writ of Error and Order Thereon,
17. Assignment of Errors,
18. Certificate of Jurisdictional Question Involved,

and no others.

George W. Coles, U. S. Attorney.

5/26/24.

[fol. 123] IN UNITED STATES DISTRICT COURT
CLERK'S CERTIFICATE

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings, in the case of Archibald McNeil & Sons Company, Inc., vs. United States of America, No. 9792 September Sessions, 1922, as per praecipe filed, a copy of which is hereto attached, the transcript of record in the above entitled cause is to include, now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 2nd day of June, in the year of our Lord one thousand nine hundred and twenty-four, and in the one hundred and forty-eighth year of the Independence of the United States.

George Brodbeck, Clerk. (Seal of the District Court of the United States, E. D. Penna.)

Endorsed on cover: File No. 30,409. E. Pennsylvania D. C. U. S. Term No. 444. The United States of America, plaintiff in error, vs. The Archibald McNeil & Sons Co., Inc. Filed June 12th, 1924. File No. 30,409.